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CLAIM NO. 297.

MANUEL LARIOS FOR LANDS NEAR SAN JUAN BAUTISTA.

CLAIMANTS BRIEF, BY HORACE HAWES OF COUNSEL.

The Proof is,

1. The land claimed is less than one league, and has boundaries clearly defined, known and recognized by all for twenty years.

2. That Manuel Larios has lived on it with his family, occupied it with his cattle, horses and sheep; inclosed and cultivated portions of the land, continuously and without any interruption, for *twenty* years at least, and that during that whole period up to the American war, he has been uniformly recognized as the undisputed rightful occupant and owner by all the *Colindantes*, the citizens, and the public authorities.

3. That on the 4th May, 1839, a grant in full property was executed in favor of Larios, *then* having been many years in possession, by José Castro, Prefect of the District, which grant was made not only in the legitimate exercise of his functions, but in pursuance of an express order of the Departmental Government.

[Note 1.—The division into sections is adopted for convenient reference.
2.—The organization of the Mexican Government is only referred to as it stood from the beginning of 1837, to Oct. 1841, which embraces the date of the concession in this case.]

4. Such are the facts without dispute. Now what are the rights of the claimant? He is one of those who under the ample guaranties of the eighth Article of the Treaty of Guadalupe Hidalgo, has elected to "continue where he now resides, and become a citizen of the United States," accepting the pledged faith of the nation, that he should be secured in the "free enjoyment of his liberty and property."

5. We know that this property of his was secure to him under the former government, for his right was never disputed but acknowledged by all, and what that government would do is the criterion for us.

6. If the right or title of the claimant was defective, its *confirmation* by the government would be *presumed* from the fact of his continued possession and occupancy, as was determined by the Supreme Court of the United States in the case of the U. States *vs.* Pellerin and others, 13 Howard, 10, 11.

7. But we depend not on presumption; we have affirmative proof of the *fact* that his right *was* recognized, by the official document of the Prefect, duly executed, and authenticated in the legal form, in which Larios is declared "*owner in property* in conformity with what had been ordained by the Governor," (en conformidad con lo dispuesto por el Señor Gobernador.)

8. Now the ninety-sixth Article of the Organic law of the 20th March, 1837, provides that the Prefect "shall be the ordinary channel of communication between the Governor and the subordinate authorities of the District, and any application whatsoever of the latter to the former must be accompanied bp his *informe*;" and the 187th Article of the same law declares, "the channels of communication established in this law cannot be departed from except in extraordinary circumstances, or in case of complaint against one of the functionaries through whom the communication has to be made."

9 The document referred to being attested by the Secretary in due form, and moreover proved by the oath of the Prefect himself, to have been executed at its date, is *conclusive* evidence of the facts stated in it. Being an official and public document it imports *absolute verity* by the common law of England, and equally so by the Spanish and Mexican law, which denominates it an "authentic document." The "instrumento autentico" which is an official document attested by the Secretary or officer constituted by law to attest it, or else by two subscribing witnesses, attesting its execution by the public functionary whose act it purports to be, is entitled to full credence *per se*, (*hace fé* por sí mismo) as may be seen by reference to *Escreche Dic. de Legislacion*, Madrid ed. (in 2 vols.) title "Instrumento Publico," Feb. Mej. v. 5, p. 56, §100, and generally every Spanish and Mexican author who treats of the subject. The Prefect also testifies before the Board that it is true as stated in the document, that he acted in pursuance of an *express* order of the Governor.

10. Again, the Prefect, who as may be seen by reference to the said law of 20th March, 1837, Art. 61 to 104, is the Chief Executive officer of the District, exercising nearly the same functions as the Governor within those limits, is the *only* authority competent to transmit to the subordinate authorities, or to the citizens individually, or collectively, either the laws of Congress, orders and decress of the General Govern-

ment, Dispositions of the Departmental Junta or Assembly, or of the Governor. There is no other channel through which they can ordinarily pass. When the Prefect officially declares that the Governor or the Government thus orders, it is conclusive.

11. The only power which Governors have to grant lands, is a *delegated power*, derived not directly from any statutory provision, but from an executive *regulation* made for the *execution* of a law, requiring the Government to *colonize* or *settle* the country, and "the power thus to regulate the execution of the law," says an eminent jurist now occupying a seat on the bench of the Supreme Court of the Republic, "is one which flows *naturally* from the quality itself of the executive power," and is equally competent to all the agents of the administration placed at the head of each one of the Demarcations into which the national territory is divided."

12. The power to distribute lands *to settlers in conformity with the law*, may be *delegated* then, and always has been delegated, but it ought to be committed to those subordinate agents of the administration, constituted for the purpose of carrying the law into execution in ordinary cases.

13. By the first art. of the Royal Instruction of 15th October, 1754, the sub-delegates appointed by the Viceroys, are authorized to subdelegate their commissions for the provinces and places distant from their residences, as had been done before, and by the regulation of 21st November, 1828, the Supreme Government, that is, the President, *has delegated* to the Governors of the Territories and the Territorial Deputations, the authority which the law of 18th August, 1824, (art. 16) commits to the *Government alone.*

15. To say therefore that the power which the law has entrusted to one functionary, cannot be delegated, is to say that all grants made by the Governor, with the approval of the Assembly or Deputation, however conformable to the objects of the law, are totally void, for certainly the law of 18th August, 1824, and especially the 16th article, does not even mention these functionaries, and consequently not even a town lot in the most distant part of the Republic, could be granted to an actual settler, except by the President himself, to whom the *law* has entrusted the business of colonization.

16. But will it be said that although the authority which the *law* itself confers, may be delegated, and has been rightfully delegated by the President, yet that the authority conferred by an *executive regulation* cannot? The reason for such a proposition is beyond my comprehension, although I could see *some* plausibility in the converse of it.

17. If the exercise of this power to *colonize or settle* the public and vacant lands by functionaries and authorities subordinate to the President, to whom the law has especially committed it, be by delegation properly speaking, then I say, it may be delegated to those public functionaries, who by the Constitution are authorized and required to see to the execution of the law; and in this sense the power in question has often been delegated to the Governors, the Prefects, and in many instances, to other authorities subordinate to the Prefect, as to Justices of the Peace, Alcaldes, and Ayuntamientos, who, in some instances have been empowered to grant *solares* to settlers in towns, not by any provision of the

law itself, but by instructions communicated from time to time by the superior authority.

18. But the exercise of this authority to distribute lands to actual settlers, to execute the laws on the subject of colonization, to "bind the conscience of the Government," so that it ought to redeem its pledged faith to the settler, who has complied with the terms which it has offered, and placed himself within the legal guaranties, is not by delegation in the ordinary sense of that expression.

19. The object of the law of 18th August, 1824, like that of 18th June, 1513, which is L. 1 T. 12 Lib. 4, R. I., is colonization, the settlement of vacant lands. The latter, which is unqustionably in force in Mexico in its most essential parts, provides: "In order that our vassals may be encouraged in the discovery and settlement of the Indies, and may live with the comfort and convenience which we desire, it is our will that there be distributed houses, *solares*, lands, *caballerias*, and *peonias to all those who shall go to settle new lands* in the towns and places which by the Governor of the new settlement, shall be indicated to them'&c.; . . . and having *established their habitation* in, and *cultivated them and resided in those towns four years*, we grant them authority, so that thence forward, they can sell and do freely as they will with them, as of a thing which is their own (*como cosa saya propia.*")

20. The whole power conferred upon the General Government by the Mexican law of 18th Aug. 1824, so far as respects the territories, is comprehended in the 16th Article. By this, the government is to proceed to *colonize* or *settle* the territories of the Republic. No power is directly given to grant or alienate lands or lots. This is an *incident*, and can only be exercised as a necessary incident to the power which *is* given to settle the country, to people the vacant lands, to colonize it, and only so far as is *essential* in the execution of this power. In these two laws we have the spirit of the whole system of the distribution of lands in Spain and Mexico.

21. *Occupancy*, not possession merely, but beneficial occupancy is not merely, or properly a *condition* which the law itself annexes to the distribution of lands. It is more—it is the principal direct means, the essential and *only mode* by which the dominion is acquired. The public functionary who receives petitions, institutes the requisite investigations and extends to the applicant the document intended for his security, thus admits and recognizes him individually with respect to the land or lot solicited in the class of settlers, and entitled to the benefits and advantages proffered by the laws, but does not confer the *right of property*. This, the settler acquires for himself; he earns it; he makes himself the owner by accepting the proffered terms, and placing himself within the legal guaranties. The public functionary does not give it; he can not, for it is not his to give, and *nemo dat quod non habet*. It is the law—it is the nation—the sovereign, speaking by the statute that gives it—gives it to the actual resident settler, the *bona fide* occupant.

22. Such is the *object* of the law. How then is it to be *executed?* It does not create public agents, or confer special powers upon any already existing. It does not designate any of the functionaries that are to intervene in effecting the objects which it aims to accomplish. Congress, in the exercise of its delegated powers—delegated by the nation,

and defined by the Constitution, decrees that the territories of the Republic shall be colonized, and that the *government* shall proceed to do this. Who and what is the government? It is the executive power; and the Constitution specifies the executive agents, and their gradation and subordination, which constitute the unity of the Government. "As it is not possible for the administration, by itself alone, to attend to all the diversified objects which are committed to its charge, throughout the whole extent of the national territory, the division of this territory into districts, and the placing at the head of the several divisions and sub-divisions, of direct agents, with equal power to regulate the objects of their incumbency, are the only means of organizing the public administration. The regulations, orders and decrees, which, for the fulfillment and execution of the laws the executive power issues, are obligatory in all the territory of the nation; while those of the subordinate agents are limited to the respective demarcations in which they preside." (*Derecho Administrativo*, by *Lares*, p. 18.) "This Administrative jurisdiction, (that is, the administrative functions of the executive power) we say, must be exercised by the agents of the administration; and these agents are the ministers and secretaries of dispatch, the Council of State, and the functionaries placed at the head of each one of the demarcations into which the territory of the State is divided, *be they called Prefects, Gēfes Politicos*, or otherwise, and the councils of these same agents." Ib. 364.

23. 1. The political Divisions of the Territory of the Republic established by the Constitution which went into operation on the 1st Jan., 1837, are the Departments, the Districts or Prefectures, and the Partidos or sub Prefectures, at the head of each of which is constituted a chief executive officer, 6th Constitutional Law Art. 1.

2. By Art. 4, 6, Const. Law it is declared: "The interior government of the Departments will be encharged to the Governors with subjection to the General Government."

3. By art. 1st of the organic law of 20th March, 1837, it is declared that the interior Government of the Departments shall be comitted to the charge of the Governors, Departmental juntas, Prefects, sub Prefects, ayuntamientos, Alcaldes and Justices of the Peace.

4. By art. 17 of the 6th Constitutional Law, it is declared:—"In each Capital of a District there shall be a Prefect nominated by the Governor and confirmed by the General Government, who shall hold his office four years and may be re-appointed." To be eligible he must be a Mexican citizen in the exercise of his rights, over thirty years of age, a native or *vecino* of the Department and possess a capital which yields him at least one thousand dollars a year.

Among his attributions are specified:—

1. "To take care of public order and tranquility in his district with entire subjection to the Governor."

2. "To fulfil and cause to be fulfilled the orders of the Government of the Department.'

3. "To watch over the fulfilment of the obligations of the Ayuntamientos, and in general, over all that which concerns the branch of *policia*, (good order and government.)"

5. By Art. 19, it is provided that:—

"In each Capital of a Partido there shall be a sub Prefect, named by the Prefect and approved by the Governor, who shall hold his office for two years, and may be re-appointed."

He must be a Mexican citizen in the exercise of his rights, a resident citizen of the Capital of the Partido, above twenty-five years of age and possess a capital which yields him at least five hundred dollars a year, and it is declared that:

"The functions of the sub Prefect in the Partido are the same as those of the Prefect in the District with subjection to the latter, and through him to the Oovernor."

6. By the organic law of 20th March, 1837, article 63, it is made the duty of the Prefect to publish without delay, observe and cause to be observed the laws and decrees of Congress, *which he may receive from the Governor*, and circulate them opportunely among the towns of his district, through the medium of the Sub-Prefect; and by article 167 the Alcaldes, in the towns of their residence, are required to watch over the execution and fulfillment of the police regulations, and of the laws, decrees and orders *which may be communicated to them by the Sub-Prefect*, or by the Prefect in defect of the former, &c.

7. The Alcaldes constitute one of the three classes of officers of which the Ayuntamiento or Town Council is composed, (Art. 125,) and preside in case neither the Sub-Prefect nor Prefect should be present, (Art. 174.) Of course, then, the office is municipal. The office of Sub Prefect is also municipal, being so expressly declared, (Art. 120;) so is that of the Justices of the Peace, (Art. 185,) which in certain cases have all the powers and obligations of Ayuntamientos, (Art. 100, 180; see also Art. 120, and law 28th Nov. 1836.)

8. But the Prefect is one of the functionaries of Government, properly speaking, standing in the political order alone, and the office is supervisory over all the towns, municipalities, and functionaries of every class in his district, (Art. 65, 70, 79, 94, 95,) in which he is styled in law the first political authority.

24. These are the depositaries and agents of the Executive power—the President, the Governor and the Prefect. In the municipal organization there are the Sub-Prefects, Ayuntamientos or Justices of the Peace, according to the population and other circumstances, which are to exercise the functions assigned them in subjection to the Prefect and Governor. But the only constitutional subdivisions of the national territory for the complete organization and distribution of the Executive power are the departments, the districts, and the partidos, over which preside the Governor, the Prefect, and the Sub Prefect. The Departmental Junta is the "Governor's Council" only, and has no legislative authority; the *whole* legislative power of the country being vested in Congress, as may be seen by reference to articles 5 and 10 of the Constitutional *Bases* of 23d Oct., 1835, and article 1st of the *third* constitutional law.

25 These are the constitutional agents of the Executive Power—the Government. Congress made it the duty of the Government to proceed to colonize the territories. The Government directed its immediate subordinate agents, the Governors, to execute the law by a general regulation, and in some instances by *special* orders and instructions; and the Governor of the department of California, in the instance under conside-

ration, instructed the next subordinate constitutional agent of the Executive Power, to concede in conformity with the very spirit and intent of the law, *to a settler*, the small piece of land which he had already actually occupied and cultivated for more than four years, the period of resident settlement acquired by law to require the absolute dominion.

26. Let it be supposed that Congress had said "the *Governors* shall proceed to colonize the territories in which they preside," would there be any doubt that the Governor might authorise any subordinate executive agent to concede vacant lands in the same terms that they themselves are now empowered by the Executive regulation of 1828, and have been from time to time by special instructions? is it because the powers of the Govornor are derived from a general regulation, that he cannot employ in the execution of them any subordinate executive agent? We have already seen, (section 22,) that every constitutional executive agent has *inherently* the power to issue general orders, regulations and decrees, and that "this is an act which emanates *naturally* from the quality itself of the Executive power." It is only necessary to the validity of such acts that they be done in the execution of the law, and in obedience to, or at least not in conflict with superior orders, regulations or decrees. There can then be no doubt that any act of the Prefect within his district, done in obedience to the orders of the Governor, has the same force and effect, (and no more or greater,) as if done by the Governor himself. There are, however, some cases of which it will be in point to speak in the proper place, in which the law has constituted the Prefect the *primary* agent for its execution, and in which consequently no inceptive superior action would be requisite.

27. The Prefect is the constitutional functionary by and through whom the Governor acts in the district over which he presides, and by whose intervention all laws and superior orders are to be carried into execution, (section 23.) He is the person designated by the Constitution and by the organic law of 20th March, 1837, to *authenticate* the orders of the Governor which are to be executed in his district, and through him alone can they legally be communicated, except in extraordinary cases. A document under his hand and properly attested by the Secretary of the Prefecture, purporting to be in pursuance of the Governor's instructions, is by the Mexican law entitled to implicit credence *per se*, and the instructions need not be referred to till the Governor disavows it, for the Alcaldes are to execute *only* the laws, decrees and orders which they receive from the Prefect by the hand of the Sub-Prefect, (sec. 23—6.)

28. The act of Don José Castro, therefore, was the act of the Governor, and has precisely the same force in the view of the case taken thus far, as if the document bore the Governor's signature in place of that of the Prefect.

29. I do not say that in this view of the case, the title acquired, would, according to the distinction made by American Courts, be anything more than an equitable one, till approved by the Departmental Junta, or that the right acquired would be anything more than the right to insist upon the observance of good faith, and the redemption of its pledge on the part of the State, given through its constitutional authorities to a settler, who had already, before it was given, fulfilled every duty, condition and obligation incumbent on him by law, as such, and

who was consequently subjected to no new conditions in the document under consideration in this case. It imports but little to him, in what class or category his property is placed in the nomenclature of legal science. It is of more consequence to him to know whether he is to be despoiled of his possessions, and driven from his own fireside; whether the very habitation in which twelve of his seventeen children have been born and nurtured, is to be taken from him.

30. But I propose another view of this most equitable claim. It is maintained that the concession of the Prefect would be valid and complete without any superior instructions. José Castro, who filled at different periods, the offices of Prefect and Governor, and Manuel Castro, who filled the former office, both testify that the constitution and the law confer this power on the Prefect, and that it was the custom for them to exercise it. That custom, then, though founded in mistake of the law, is the law of this case. Congress has said so in the law establishing this Commission (sec. 11). The Supreme Court of the United States has said so in the case of McKeen vs Delancy's lessees, 5 Cranch 22; the Supreme Court of Pennsylvania, in McFarran vs. Powers, 1 Sarg. & R. 102. The Supreme Court of California have said so in the case of Panaud vs. Jones, 1 Cal. R. 499; and this is consonant to the soundest principles of reason and justice. The United States, as the successor to the Mexican Government do not undertake to rectify all the disorders which existed in the administration of the latter. What has been done must remain as we found it. What would be the rule in Spain and Mexico? In those countries, revolutions, conquests and re conquests have often occurred.

31. "If," says the law, 5 T. 3 lib. 10. of the *Fuero Juzgo*, "before the Goths came to the country, the Romans (the ancient inhabitants) gave to any man, a piece of landed property, or sold, or exchanged the same, that must remain stable."

"Behold here," says a commentator, "a principle worthy of the most civilized nation. *That which the conquest finds existing, the conquest must respect.*"

"Other kings," said Theodore, King of the Ostrogoths, "have aimed in their conquests, at the destruction of property, and the ruin of cities. I have proposed to myself to make such a conquest that the conquered themselves shall regret that they had not sooner fallen under my dominion."

32. Fourteen centuries of civilization have not improved upon the political maxims which guided the Gothic conquerors of Spain, and which were incorporated in the Code just cited.

In respect to property that which the conquest finds existing, the conquest must respect. The possessors thereof must be left undisturbed. A responsibility without measure rests upon that government which shall invade so sacred a principle, and when it shall have passed away the detestation of the entire world will follow its memory.

33. In all Spanish American countries a great portion of lands have been occupied under imperfect titles, and titles derived from functionaries which were not authorized to confer them. But I doubt whether an instance can be found in the history of three centuries in which the resident settler was ever disturbed for this cause. If defects have been sought out, the

motive has been to cure them and confirm the possession, always. Titles to land in the Indies conferred by Ministers, who had no authority whatever for that purpose, were confirmed by the King in the Supreme Council, as is stated in the concluding part of L. 15 T. 12, Lib. 4 R. I.

34. In Cuba previous to 1797, many grants had been made of tracts called *hatos* for cattle, consisting of from one to five and six leagues, by the *Ayuntamientos* without authority, and a project was set on foot but repudiated by the King and Council for reclaiming to the use of the Royal Treasury, all lands for which the possessors could not exhibit legitimate titles.

35. In an *informe* on this subject, presented to the Ministry by Don José Pablo Valiente, after stating his conclusion, that the titles in question were not valid, for the want of authority in the Ayuntamientos, and because in many cases they did not purport to transfer the *property* in the lands, he says:

36. "It may be said, and it is very true, that in a soil which has been, without doubt, the sole property of the Sovereign, the *Fisco* has an incontestable right to require every possessor, whatever, to show a legitimate title, and not doing so, that he may reclaim the land without entering into any other discussions, leaving to each one his right reserved against those who may be liable, since neither the transcourse of time, nor long possession nor good faith, nor any of these are sufficient to cause prescription against his (the Sovereign's) dominion. But this *summum jus*, so to speak, would it be convenient to the public revenue or the Royal Treasury, or consistent with the beneficent intentions of the King towards his subjects in the situation of affairs in the Island? The equity of your Excellency will determine. For my part, I conceive that such a measure would end in the entire ruin and depopulation of the interior towns, and I will say moreover, that it would be most unjust in itself."

37. "In good faith the *Fisco* cannot be ignorant that the possessors found their dominion in the *repartimentos*. If to make them and transfer the property to the grantees, the *Ayuntamientos* had royal authority, this ought to exist in their archives, and not in the titles of individual possessors, to whom no other document is given, but a testimonial of the resolution in which the grant is made to them, and consequently there is no reason for exacting from them proof which they do not possess nor ought to possess."

38. The final result was that all the grants made by the *Ayuntamientos*, up to the time when they had been expressly prohibited by a royal ceduula were confirmed—that those who were in possession for forty years without any documents whatever, were considered as having a complete title by prescription, and the occupants for ten years, without any documents, were also confirmed in their possessions and had legal documents issued to them, for which they paid a small composition to defray the expense of them. This will be found in the royal resolution of 19th July, 1819, promulgated after the subject had been maturely considered in the Supreme Council of the Indies. A multitude of similar confirmations might be referred to. In *all cases* where colonizable lands have been granted and actually occupied in conformity with the spirit of the laws, the *settler* has been left undisturbed in his possessions, though a mistake may have been committed, either in respect to the legal power

of the officer who made the grant, or in the observance of any of the legal formalities. If the settler has complied with *his* obligations, the government has always rectified the mistakes of its agents, and the title has been confirmed. What the Mexican Government would do, ours must do if it would be just.

39. But it is maintained that the custom referred to, in conformity with which Don José Castro made this grant was not founded in a mistake of the law, but was conformable to it.

40. By the aforesaid organic law of 1837, the Prefect who presides over (Art. 94 and 95) all the towns and all the Authorities of his District, is required (Art. 91) to cause that the scattered inhabitants be collected and live in towns and settlements. This is what the Prefect endeavored to do at San Juan Bautista, in conformity, he says, with the policy of the Departmental Government. They are also required (Art. 76) to propose measures for the promotion of agriculture and all branches of industry, &c.

41. Art. 77, "They shall regulate (arreglaran) executively (gubernativamente) and conformably to the laws, the distribution (repartimiento) of *Tierras Comunes*, in the towns of the District whenever there is no litigation pending in the tribunals respecting them, reserving to the parties their right to appeal to the Governor, who without further recourse, will decide the matter as may be proper, with the concurrence of the Departmental Junta."

42. To define what is the full import of the idea *to regulate*, I will refer without further comment to the exposition of it given by Chief Justice Marshall, in the case of Gibbons *vs.* Ogden, 9 Wheat. 196. Speaking of the constitutional power vested in Congress "to regulate" commerce.

43. *Repartimento* of lands is the distribution made to settlers for their personal use and occupation. It is the word used in the original law, (that already cited) authorizing the distribution of lands to settlers in the Indies. "It is our will that, *se puedan repartir y repartan* houses, lands, salares, &c. to all those who go to settle new lands, &c. It is the word used in this sense in laws 2, 3, 5, 6, 7, 8, 10, 15, T. 12 Lib. 4, R. I., In the *Ordinanzas de Poblaciones* throughout, in article 15 of the *Decreto de Cortes*, of 4th January, 1813.

44. The distribution or repartimento of *tierras comunes* in *suertes* to resident settlers was decreed by the Spanish Cortes on the 4th January, 1813, in the law of that date, for the reduction to private property of the "*valdios y otros terrenos comunes.*" To comprehend fully the object of this law, and what is meant by *tierras or terrenos comunes*, we have to refer to a few facts in Spanish history respecting the foundation of landed property.

45. "By right of conquest the Goths occupied two thirds of the improved and cultivated lands as soon as they had conquered Spain, and established their monarchy therein, leaving the other third in each Pueblo to the ancient inhabitants who were denominated Romans by the Gothic laws. This division in which the private property and dominion in lands and estates in Spain is founded, is, that referred to in L. 9, T. 1, Lib, 10, of the *Fuero juzgo*, in which is enjoined the observance of that *repartimiento*, not only in favor of those who first acquired the improved lands included in thd general distribution made at the time of the conquest, and irruption of

the Goths in the Peninsula, but also in favor of their heirs and descendants. The use of the *montes* and uncultivated lands, which were not included in the general *repartimiento*, remained *common*, and promiscuous among the Goths and Spaniards, as the general patrimony of the people, as may be seen in L. 10, T. 1, Lib. 10, *Fuero juzgo*." (*Escolano Practica del Consejo Real V*, p. 231 2.)

46. This system, which dedicated or rather left to the common use the vacant and uncultivated lands, has always continued in Spain in its substantial characteristics, although it suffered some innovations during the domination of the Arabs and the Moors, and by various laws the demarcations of each pueblo were designated within which its *vecinos* or citizens had the exclusive privilege of using the pasturage, fuel, watering places &c., of these *terrenos comunes*, and sometimes also of those of private ownership, (Ib. p. 232.)

47. The substance of the Spanish legislation in relation to *terrenos comunes* and the right of common pasturage, &c. will be found in tit. 7 lib. 7 *Nueva Recopilacion*, or in T. 21, 23, 24 and 25 of *the Novisima*; from all which it will be seen that the general policy of Governernment and the public clamor in Spain has been in all ages till the beginning of the present century, opposed to the distribution and reduction to the class of private property of these *terrenos comunes*, which included all the public lands of the kingdom, as all were included within the demarcation of some one of its numerous towns and municipalities. Grants, however, were occasionally made by the king, or with his especial license, either subject to the common use of pasturage, in which case it was called *acotados*, or excluding it, in which case the lands were *cerrados*, (Elizondo Practica Universal Forense, V. 5 p. 228.)

48. In the Indies as early as 1541, all the lands not distributed and reduced to the condition of private property were also declared in respect to their use and enjoyment to be common; and even granted lands were subject to common pasturage, &c., to a certain extent in the same manner as in Spain itself, as may be seen by reference to L. 5, 6, 7, 8 and 9, T. 17, lib. 4, R. I, the first of which is literally as follows:

49. "We have ordained that the *pastos*, *aguas* and *montes*, remain common in the Indies, and some persons without our authority have occupied a great part of territory and lands in which they do not allow any one to put, *corral*, nor bring thither their cattle. We command that the use of all the pastos, montes and aguas of the Provinces of the Indies be common to all those who now are or hereaftor shall be *vecinos* thereof, so that they may enjoy them freely, collect their flocks and bring their cattle there as they please, notwithstanding any ordinances, which, if need be, we so far revoke and hereby declare null and of no effect. And we ordain that all the *consejos*, (councils of towns,) *justicias*, (the judicial authority,) and *regidores*, (one class of officers composing ayuntamientos,) observe and fulfil and cause to be observed and fulfilled what is provided in this our law, and any person whomsoever that shall centravene the same shall incur the forfeiture of five thousand pounds of gold, to be executed against his person and property for our exchequer; and so far as respects the city of Santo Domingo, of the *Isla Española*, let this law be observed; provided, however, that this be understood as applicable within the space of ten leagues from the said city in circumference, and without prejudice to third persons, and

without the said space of ten leagues we have deemed it meet and permit that each *hato* for cattle have a *termino*, (extent of territory,) one league all around, (en contorno,) from the centre, so that within it no other one can make any establishment for cattle, corral nor house; provided, however, that the *pasto* thereof be likewise common, as above provided; and where there shall be *hatos*, sites (sitios) may be given to build mills and other hereditaments, and in each *asiento* (location) let there be a stone house, and not less than two thousand head of cattle, and if there should be six thousand head and upwards there may be two *asientos;* and if ten thousand and upwards, three *asientos*, and indispensably in each one of them its stone house; and no person can have more than three *asientos;* and thus let it be observed where there shall be no title or grant from us otherwise disposing."

Escreche Dic. de Legislacion, title "Baldio" defines as follows:—BALDIO. "The common land (*terreno Comun*) of a *Consejo* or *Pueblo* which is not cultivated nor turned into pasture, (*adhesado*). When the Vesigoths invaded Spain, after distributing (*repartir*) among themselves *two thirds* of the conquered lands, and leaving one-third to the conquered (inhabitants) they were obliged to leave abandoned and without an owner, all those lands which the population reduced by the wars was not sufficient to occupy. To these lands was applied the name of *campos vacantes*, and these are for the most part our *baldios*. As these barbarians had learnt only to fight and to sleep, they preferred cattle raising to the gathering of crops, and pasturage (*pasto*) to agriculture. This system took still deeper root in the times of the Moors since, as they had the enemy always in view, the greater part of their subsistence was derived from their herds. After the expulsion of the Moors, policy dedicated the *baldios* as exclusive property to the herds and flocks, and a benevolent sentiment which looked upon them as the patrimony of the poor, employed itself in preserving the *baldios* for them; without reflecting that making the enjoyment of them common, it was natural that the *rich* rather than the poor would reap the benefit. It is of the most advantage that they be sold for money or on ground rent, and be distributed (*se repartan*) in *enfiteusis* or on condition, thus constituting the means of saving from misery, a great number of poor families, while they now only furnish food for the cupidity of the wealthy graziers, and a useless resort for the indigent;" and in note three refers to the *Decreto de Cortes* of 4th January 1813.

50. Vizcaino Perez, Advocate of the Royal Councils, observes that Spain and the Indies, being conquered kingdoms, the full property and dominion in all the lands therein, pertained to the sovereign, that portions had been granted out or sold by the sovereign to individuals and corporations, and that the *use* of the rest was granted to all his subjects in common, in order that they might make use of the pasturage, fuel and other natural productions, and maintain their cattle therein; for which reason they are called "*tierras comunes.*" (*Compendio del Derecho Publico y Comun de España V.* 1 p. 334–6.) When a settlement is formed within these public lands, and grows into a town which has a *termino*, or demarcation designated by competent authority, then by the general laws, the use of the public lands, within this demarcation, which were before *comunes* (common) to all the citizens, will be restricted to the *vecinos* of the town,

to whom only they remain *tierras comunes*, unless otherwise ordained, as was done with respect to the City of Mexico, which had a *termino* assigned of fifteen leagues in each direction from the center. L. 3, T. 8, Lib. 4, R. I.

51. Neither the towns, however, nor the citizens thereof, have any *property* in these public lands, which remain *tierras comunes;* but they remain always subject to the disposition of the Sovereign.

52. "The kings," (of Spain) says Elizondo, in his *Practica Universal Forense*, (v. 3, p. 107) "fountains of jurisdiction, are the owners of all the *terminos* situated in their kingdoms, and as such, may donate them, divide, or limit them; the same being true of the *Pastos*, although the towns enjoy the use, it being presumed that they are conceded, only so far as respects the use and administration; the property remaining in the Sovereign, so that he may afterwards limit, enlarge, restrict, or give any new direction to the use and enjoyment thereof. And hence it is that the Pueblos cannot alienate their terminos and pastos without precedent, royal license and authority."

53. "Pueblos have no property except that which by royal privilege, custom, or contract between man and man, may have been granted to them. For although there may have been assigned to a town at the time of its constitution a *territorio y pertenencias*, which is to be common to all the residents, so that each one cannot separately use them, it is a right reserved to the Sovereign to distribute the *terminos* of the provinces, and of the *villas*, assigning to the latter the use, but the dominion remaining in the Sovereigns themselves. For this reason, the Princes may alter, restrict, or enlarge the *terminos* once assigned to any town, giving them new form, or revoking the ancient; so that no Pueblo can acquire any exclusive right to their *pastos* as against the king, unless by his especial privilege or immemorial prescription." (Ib. v. 5, p. 226.)

54. The Spanish Cortes, in consequence of suggestions presented by the Minister of Marine, on the 5th Oct. 1811, entered into an investigation respecting the utility of the policy which had then been pursued in Spain on this subject, for fourteen centuries, which resulted in the conviction that it was calculated to retard the progress of population, and destructive to the interests of agriculture; and that incalculable advantages would result from the sale and distribution of those public lands, in the towns, which had been subject to the common use of the citizens, as well as those of the propios, and the reduction to private property of all the lands in Spain, as well as in the provinces beyond the seas.

55. Says the Committee on Agriculture, in their report presented to the Cortes, Dec. 22, 1812—"Let the vacant lands be sold; let them be distributed (repártanse) either gratuitously or for a moderate rent. The State will gain much, if proprietors are multiplied, if those become such who are not so, and if at last there shall not be in Spanish soil, a single vara of land, without a determined owner. The utility will be incalculable, as likewise it will be to reduce the *propios* to private dominion." "Your Majesty," (the *Cortes* were then so addressed) "may, however ordain one thing—that making a beginning in the distribution (repartimiento) of lands, a multitude of citizens be sustained with great advantage to the nation; that is, granting a small allotment (*suerte*) of the vacant and royal lands (provided

the total of these grants do not exceed the fourth part of the same) to all the *vecinos* of the respective Pueblos of whatever class they may be who petition therefor, and do not possess in property any other land."

56. In those Pueblos where there are no vacant lands, or they are not sufficient for this distribution, there may be given to the *vecinos* not proprietors, who desire it, a like *suerte* in the cultivated lands of the *propios*, but with the condition that in this case the same *suerte* remain subjected to a perpetual ground rent in favor of the *propios*, equivalent to that which it may have yielded them in the five years ending with the year 1807." Accompanying the report of the Committee, was the project of a law, which, with some modifications not important in this case to be referred to, was, adopted, and constitutes the law of 4th January, 1813.

57. On the 8th June, 1813, a final blow was given to the system of commons of which I have been speaking, by the decree of that date which enacts that "all the dehesas (pastures), hereditaments, and other lands of every class whatsoever pertaining to private domminion, be they free or entailed are declared to be henceforth and forever *cerrados y acotados* (§ 47), and the owners and possessors thereof may inclose them without prejudice to the paths, watering places, roads, crossings and services, enjoy them freely and exclusively, or rent them as they may think proper, and destine them to cultivation, pasturage, or planting, or the use which may best suit them; being consequently abrogated all laws whatsoever which determine the use that is to be made of these lands, for this is to be left entirely to the choice of the owner." And, consequently, in many of the titles since issued by the Government, it is expressed that the grantee may destine the land to the use which best suits him, which means simply that when he has acquired the full dominion by actual occupancy, and a compliance with the conditions which the law annexes, he will be free to use his property as he pleases, exempt from the common of pasture and fuel, and the numerous legal restrictions, which constitued a part of the ancient and complicated system which was completely overthrown by the two acts referred to.

58. The preamble to the law of 4th January 1813, expresses the object of it. "The general and extraordinary Cortes considering that the reduction of *terrenos comunes* to private dominion is one of the measures most imperiously demanded for the welfare of the people, the fomentation of agriculture and industry, and desiring at the same time with this class of lands to furnish aid for the public necessities, a reward for the meritorious defenders of the country, and assistance to the citizens not proprietors, decree etc." among other things (art. 15) that there shall be given gratuitously, for once only, a *suerte* proportioned to the extent of the lands, to every citizen of the respective towns, who may petition therefor and has no other land of his own, provided that the whole of the lands thus distributed (*que asi se repartan*) do not in any case exceed the fourth part of the royal and vacant lands. The other three fourths were reserved for sale on account of the treasury, and to be distributed as rewards to the officers and soldiers of the army. (Art. 6 and 9).

59. The grants by gratuitous *repartimiento* to citizens are to be in full property, but if they fail to make use of the land for two consecutive years, it is to be forfeited and regranted to some one more industrious. The grantees can not alienate the land given them till the expiration of *four*

years, the period of time requisite to acquire the dominion by occupancy, (see *ante* sec. 19), nor at any time entail or transfer it in mortmain.

60. The word *suerte*, when applied to land, does not designate a definite quantity, but simply an *allotment* which is segregated from the rest, and is so called because in the original distribution of landed property in Spain the portion of each was ascertained *por suerte*, by lot. *Agellus, sorte habitus*, a small estate obtained by lot. As to extent or quantity *suerte* is no more definite than *sitio*, *situs*, site, a place occupied by a house, fortress, town, farm or rancho. By Tit. 14, Art. 5, Reglamento of 1781, the *suertes*, or allotments to be assigned to the new pobladores were limited to two hundred varas square, of which four were to be given to each.

61. When we regard the strictly proper sense of words, *suerte* will be found to be the only generic expression to convey the simple and unqualified idea of any allotment of land, and *that is the way it is used generally*, as well as in the 10th and 15th articles of the law of 4th January, 1813, which require that the *suertes*, the tracts, portions or allotments of land shall be proportioned to the extent of land subject to *repartimiento*, and of greater or less extent, according to the value and the countries where they are situated.

62. The 9th article of the law of 18th August, 1824, like the 3d article of that of 4th January, 1813, recognizes, in the concluding part of it, the preference due to those who are resident in the place to which the lands belong, which may be distributed *que se repartan*.

63. The *terms* of the 77th article of the organic law of March, 1837, being all made clear, it requires no argument to show what is the nature and extent of the authority conferred, for the language is not ambiguous. It is only necessary to know the *meaning of the words*, which I aimed to explain by a brief reference to the legal history of the subject matter.

64. " They shall *regulate*," that is, they shall *prescribe the rule* by which the *repartimiento* is to be governed. Gibbons *vs*. Ogden, 9 Wheat. 196, and sec.) The power conferred over the subject, whatever that subject may be, is as full and complete as that conferred on the President over the subject of colonization by the 16th article of the previously existing law aj 18th August, 1824. It is subject to no restriction, but what the laws impose, requires, in order to its exercise, no seperior inceptive action, and is liable to no control or review, except that which inherently or by some express dispositions of the public law of the State, resides in the superior functionaries in the political order.

The *matter* thus to be regulated is the *repartimiento*, or distribution in full property " conformably to the laws," (sec 43, Ll. 1, 2, 3, 5, 6, 7, 8, 10, 15; T, 12, Lib. 4, R. I. and secs. 45, 55, 58, 59, 62; L. 3, T. 22, Lib. 7, Nov. R. arts. 12, 13, 22; L. 4, 5, 7, art. 5; L. 8, arts. 6, 7, 10, same tit. and Lib.; Decree 13th March 1811; ib. 4th June 1823, arts. 1, 2, 3; ib. 19th July 1823, art. 9; ib. 6th Aug. 1823, preamble and art. 3; ib. 18th Sept. 1823; ib. 14th Oct. 1823, art. 7; ib. 18th April 1828, art. 1 and 2), of the *tierras comunes*, that is the public lands, which by the laws of Spain and the Indies remaining *vigentes* in the Republic were dedicated to common *use* and pasturage (secs. 47, 48, 49 and 50, L. 5, 6, 7, 8 and 9, T. 17, Lib. 4, R. I.; L. 2, T. 21; L. 1 and 2, T. 23 and L. 1, T. 24, Lib. 7 N. R.) *in the towns*, that is within the *termino* or demarcation of the municipality, which embraces frequently a very extensive territory, Mexico for example, had originally a termino, 15 leagues (say 75 miles) in diameter. The municipal limits of Monterey extended to about 30 miles north of the site on which the present city exists; (*vide* sec. 50.)

The powers conferred are to be exercised *gubernativamente* or executively, that is, in the manner and form, and in the constitutional order prescribed for the action of the Government or Executive, (same law art. 3, at. 12; arts. 4, 5, 64, 65, 66,) and not by invading the province of the legislature or the judiciary, because the constitutional bases of 1835 art. 4th, declares that no two of the three powers must ever be confided to the same person, a principle which has always been regarded as sacred, in Mexico, since the adoption of the Constitution of 1824.

CONCLUSION.

The claim in this case is entitled to confirmation then, on the grounds already stated at large, namely:

1. Because the claimant was in undisputed possession of the property, claiming and acknowledged to be the owner at the time of the conquest and the treaty subsequently made, and had been continuously in possession for many years before.
2. He had complied with all the requisites and conditions prescribed for settlers in any and all the laws and regulations, Mexican and Spanish.
3. The grant of May 4, 1839, being made by express order of the Governor, was the Governor's act.
4. That it was made in pursuance of such order, cannot be disputed, because it is so declared in the official document of the Prefect, proved to be genuine and authenticated in the legal form.
5. The Prefect was authorized to make the grant on his own authority, by the express provisions of the 77th article of the organic law of 20th March, 1837.
6. The custom, in conformity with which the grant was made, though founded in mistake of the law, constitutes the law of the case.
7. The approval and confirmation of the claimant's right by the former Government, is to be presumed from his long and undisputed possession.

HORACE HAWES.

LAND TITLES IN CALIFORNIA.

ARGUMENT

BEFORE THE

Commission on Private Land Claims

IN CALIFORNIA,

IN THE

CASE OF CRUZ CERVANTES,

Claiming the Rancho of Rosa Morada.

DELIVERED ON FRIDAY AND SATURDAY, 4th AND 5th JUNE, 1852.

BY WILLIAM CAREY JONES,

OF COUNSEL FOR CLAIMANT.

SAN FRANCISCO:
MONSON, WHITTON & CO., PRINTERS,
Commercial Power Presses, 272 Montgomery St.
1852.

San Francisco, June 8th, 1852.

W. Carey Jones, Esq.

Dear Sir:

The undersigned, members of the Bar, having listened with great interest to your closing argument in the case of "Cruz Cervantes," before the U. S. Board of Land Commissioners, take the liberty of suggesting that its publication would greatly facilitate their own labors before the Board, as well by the thorough collation of American authorities which it contains, as by the learning and research in Spanish and Mexican law which it exhibits. They would be greatly pleased, therefore, if you would consent to publish the same at an early day.

With the highest regard,

CLARKE, TAYLOR & BECKH,
SAUNDERS, HEPBURN & BAGLEY,
SUTHERLAND & CARR.

San Francisco, June 8, 1852.

Gentlemen:

I have pleasure in acceding to your request, and am much obliged to you for the flattering manner in which it is conveyed. In compliance with your wishes, I will immediately cause my argument to be delivered to the press, and shall be very happy if it can be of any avail in subsequent labors before the Board.

Very Respectfully,
Your ob't serv't,
WM. CAREY JONES.

Messrs. Clarke, Taylor & Beckh,
Saunders, Hepburn & Bagley,
Sutherland & Carr.

COMMISSION ON LAND CLAIMS.

CASE OF CRUZ CERVANTES.

ARGUMENT.

The objections taken to this claim, by the Law Agent of the United States, are substantially as follows:

1. That it has not been surveyed according to a certain ancient ordinance of the Viceroy of Mexico, now published in the Law Directory of Escriche.

2. That the claimant has not shown that he built a house on the land within one year after the grant, according to one of the directions contained in the grant.

3. That the grant was of land which had been pertinent to a Mission, and hence not grantable.

4. That the claimant has not shown that his grant was approved by the Territorial Deputation.

5. That the land embraced in the grant had been proved, by the proceedings prior to the grant, to be within ten leagues of the sea-coast, and hence (whether in point of fact that was its position or not) the grant was void.

This is not the order in which the objections were stated, but they embrace, I believe all that were taken.

I. In regard to the survey: that made in the act of Juridical Delivery was substantially according to the ordinance quoted; it ascertained the limits on all sides where there were adjoining neighbors, which is the only object contemplated by surveys of grants under the Spanish or Mexican mode of distributing lands. This survey fixes three of the lines; quantity fixes the fourth. If the lines were not run by the compass, it was because there was not such an instrument in the country; because the boundaries expressed in the grant did not admit of a survey by right lines; and because the adjoining neighbors, the only persons interested, did not require it; a circumstance contemplated and provided for in the ordinance. The only departure, then, from the ordinance is in the fact that the magistrate did not begin in the centre of the land and measure outwardly. As this rude mode of surveying, which has led to infinite mischief wherever adopted, and has long since gone into disuse, was not the best mode of ascertaining the boundaries of the tract, I think the magistrate will be excused for not adopting it.

This mode of measuring lands came into practice in the great plateau of Mexico, and some other parts of Spanish America that became suddenly populous; where the settlers dropped down, as it were, on the domain, prior to receiving grants, and without system; then, the plan was adopted of considering each one's house as the centre of his tract, or claim, and hence the plan of going to the centre to measure outwardly. It was never adopted in the great rural grants, which were by natural boundaries--from mountain to mountain—river to river—of which the only surveys were by *vista de ojos*—occular inspection. The ordinance quoted, never was law in California; as already stated, it has long since gone into disuse, even in Mexico; and it is reproduced in the Book of *Escriche*, as a curiosity—a remnant of antiquity, dug up from old manuscripts in a private library, and is now for the first time printed. The original intention of the ordinance was not for the measurement of grants, but to settle private disputes, and ascertain priority of private rights, as is shown in the note that follows its directions for measuring *sitios*. Neither Spain or Mexico ever had any regular surveys of their domains. The grants were almost invariably made according to the selections of the grantees, and seldom surveyed until a multiplication of grants in the same neighborhood required it for the purpose of determining coterminous lines.

Under the Mexican government, there was never a surveyor in California. Under the Spanish government there was a royal engineer, who occasionally made surveys to the extent of running out disputed boundaries, as for instance, about the year 1802, the boundary between the Mission of Santa Clara and the Pueblo of San José; but in ascertaining the limits of those establishments, this engineer did not consult the present distombed ordinance, nor begin in the middle of the tracts and measure outwardly. We all know that no such system prevailed in the Spanish provinces of Louisiana, Missouri or Florida.

2. The Mexican laws concerning grants of lands do not contemplate surveys. It is well known, that there was no person in California competent to make a survey; and if this ordinance was required to be fulfilled, it was equivalent to forbidding any grant to be made. If it were ever in force, either it repealed the Colonization Laws and Rules, or they repealed it. The second section of the law of 1824, shows that other means than surveys were con-

templated for ascertaining the land to be granted. The law does not require even judicial delivery. The reports of magistrates and of witnesses, to identify the land, and declare whether it were vacant, show that the lands were ascertained and known before hand. The judicial possession was only in the nature of *livery of seisin*—an act *in pais*—to make the possession, and the extent of it, notorious: to settle and to avoid disputes. The right and the fact of entry existed before.

3. That no where is a survey necessary to the validity of a grant. In connection with a grant, the only object of a survey, is to ascertain the land. If this is ascertained by the grant, or may be by testimony *dehors*, the grant is good, and a survey a distinct matter, neither hurting nor helping its validity. This is held by the Supreme Court, in relation to Spanish grants even in those provinces where there was a royal surveyor, whose business it was to lay off grants of land. In *Arredondo's case*, 13 P. 134, the issuing of the Spanish title was specially reserved till the grantee should cause an official survey to be made, and return the plat, for the description to be entered in the patent. Yet the want of a survey was held not to interfere with the effect of the title, or with the right of the party to the land granted; and though no survey had been made, *nor even the locality definitely ascertained*, the grant was confirmed by the judgment of the Court, and the surveyor general ordered to make a survey at the place named in the grant. Many other cases are to the like effect.

4. That laws concerning surveys are *directory* to the officer, and the grantee cannot suffer by his omissions or mistakes. (3 Wh. 594. 3 Pet. 320.) That this is specially the case, in the presence instance, where the provision in the grant, is, first, without authority of law, and, second, merely directory to the judge.

5. That whether a survey were made or not, or if made, whether correct or erroneous, the natural objects called for in the grant would govern. 9 Cr. 173. McIvers *v.* Walker, 6 P. 498.

II. To the objection that the claimant has not shown that he built a house on the land within a year after the date of his grant, I reply,

1. That the law does not make any requisition of that kind, and hence that the condition inserted in the grant is not obligatory. Section 11, of the Regulations of 1828, provides that a certain time shall be fixed by the Governor within which improvements shall be made; but this provision relates only to concessions made to *empresarios*, for colonization.

2. That by the provision inserted in the grant, non-performance does not void the grant, only opens the land to denouncement until which time the grant was good, and even then the grantee would have had preference over any other who might desire it, and an extension of time on proper showing, be given him to occupy it. The first section of the Regulation of 1828, authorizes the Governor

to grant lands to persons who may solicit them "with the object of cultivating or inhabiting them"; but no time is prescribed within which this intention must be carried into effect. If carried into effect, therefore, within a reasonable time—within a time to show that the application was sincere—both the purpose and the letter of the law will be answered. In the present case the occupation did follow within a reasonable time, and in time to show that the grant was solicited for the purpose contemplated in the law. Moreover, the disturbed state of the country, and particularly of the neighborhood where the land was situated, was a sufficient reason for not opening a new and exposed settlement, during the years 1836 and 1837. Before the revolution was completed, or order restored, the grantee had made his settlement, built his house, and established his family, as is shown in the testimony. This is as much diligence as any law can require.

3. Even if the grant were voidable, for non-improvement of the land within a year, the subsequent improvement, before advantage was taken of the lapse or the land denounced, would cure the fault and consolidate the title. That is, if after the expiration of the specified year, and before the improvement, the land might be denounced, and granted to another; yet, if not denounced, during that interval, it could not be after the improvement or occupation. The condition in the grant does not contemplate the forfeiture of the land to the government; only proposes to make it voidable, in favor of another, more enterprising than the grantee, should any other seek it in the prescribed mode. The title does not, and does not profess, to reserve any power in the government to recall the grant to itself. As this tract was never denounced, the necessary inference is, that, according to law and the usages and customs of the country, it was never opened to denouncement. At all events, if ever denounceable, it ceased to be so after the improvement was made or occupation commenced.

4. Moreover, the real concession, the document by which title passes—the decree, in which the Governor parts with his discretion, and "accedes," in the language of the law, "to the request of the petitioner,"—does not contain the condition. The grant there is unconditional, in fee simple. How could the Governor afterward limit this title, by the insertion, in what is called the "title in form," and which is merely ministerial, of a material limitation like this?

III. The objection that the land embraced in the grant had been pertinent to a Mission. The objection is suggested by the law agent, under the 17th section of the Regulation of 1828.

1. This section only forbids the colonization of lands *occupied* by the Missions, and this is shown in the proceedings prior to the grant not to have been then in occupation.

2. The section only forbids *colonization*, while the right of resident citizens to settlements in those lands is expressly recognized. The language of the section is, that lands occupied by the Missions

shall not be *colonized* at present; nor till it be determined if they ought not to be considered as the property of the Indian pupils and of the *Mexican inhabitants.* This phrase has been erroneously translated "*Mexican colonists*"—as much as to say, that the lands should not be *colonized* till it be determined if they were not the especial property of *colonists;* a mistranslation which is an apt example of the confusion of terms which has arisen from a loose reading of the colonization laws and rules. It has also been suggested that the section alludes to Mexican *settlers on the Mission lands.* But there were no Mexican settlers on the Mission lands. There were no settlers on the Mission lands, except the Indian laborers, servants of the Missions. So powerful were the heads of the Missions to keep off Mexican settlers from the lands which they had once appropriated, that there is an instance of record, where a Mexican settler came with a grant from the Viceroy and Audiencia of Mexico, for a particular piece of ground; and undertaking to occupy it, was opposed by the priests of the nearest Mission, and after a contest of several years, gave it up, and took another piece which the Mission had not occupied. There were, then, no Mexican settlers on the Mission lands; and the section cannot be understood in any other way, than as intended to discriminate between grants for colonization and grants to resident settlers of the country and for the *protection of the latter.* We are warned by the Supreme Court (7 Peters 95) of the necessity of careful examination of papers translated from a foreign language, containing uncertain and incomplete references to things well understood by the parties, but not perhaps understood by ourselves; and I cannot imagine a stronger case for the application of this rule. It would be a gross instance of perversion of language and mal interpretation, to construe this section so as to rob the founders of California of the rights it was inserted for the specific purpose of securing to them.

3. Whatever construction may be given to the 17th section, the laws of secularization, and the subsequent instructions of the Supreme Government opened the Mission lands like others to grants. It was stated by the Law Agent that the secularization laws did not go into operation here till 1835. I do not know where he could have received this idea; since it is well known that the regulations established by the Governor and Deputation for carrying that law into effect, went into operation in August 1834. There was also an act of the Deputation as early as May, 1834, providing especially that the vacant lands of the Missions might be colonized. The question was also presented by the Law Agent in this specious shape: whether the mere act of secularization, would determine the question presented in the 17th section of the Regulation of 1828, and so open the Mission lands to colonization? The matter does not rest on the mere order of secularization; though if it did it would be quite sufficient for our purpose, as we shall see by reference to the 6th section of the decree of the Spanish Cortes of 13th

September, 1813, that secularization of Missions includes the distribution of the lands, and their reduction to private ownership.* But the Act of 26th November, 1833, directs the Government to take active measures for the secularization and *colonization*, of the Missions of California; and the Instructions given in consequence of that decree, to the Political Chief of Upper California and Director of Colonization in Upper and Lower, in April, 1834, direct that he shall "*make beginning*" of his colonization labors, by "occupying all the Missions of both territories."†

IV. The objection that the claimant has not shown that the grant was approved by the Territorial Deputation. On this point, I contend:

1. That if the lack of confirmation by the Deputation affects the validity or binding force of a grant, it belongs to the Government to show that the confirmation has not been given; because the supposition of law is that it has been given. The supposition of law is, that the long occupation of the land by Cervantes has been rightful; that having the grant, and living on the land as its owner, with the acquiesence of the government, the supposition of the law is, that every thing necessary to the perfection of the grant had been done, and that he held the land in fee. This presumption of law becomes stronger in a case like the present, when all that remained to be done after the issue of the grant, was in the hands of the grantor, and not necessary or likely to be known to the grantee. Nor is this presumption of the law to be rebutted by supposititious testimony; it must be met, if at all, by positive testimony, or by such negative testimony as to be conclusive. As for instance, if the proceedings of the Deputation existed complete and reasonably easy of examination; and a search of them did not show the confirmation, that perhaps might be held conclusive, or to throw the proof on the claimant.

The facts shown in this particular are as follows:

On the part of claimant: That he received his grant in due form 1 April, 1836; shortly after went into occupation and has so continued; that in February 1841, he received juridical possession, from the proper magistrate, in presence of the only other parties interested, the adjoining proprietors.

On the part of the Government: That all preliminary steps were properly taken; that the concession, with the proceedings on which it was founded, was sent to the Deputation, and there referred to the Committee on Vacant Lands; that the Committee reported, recommending the approval of the grant; that the Deputation recommitted the Report for amendment.

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* "Collection of Decrees of the Spanish Cortes in force in Mexico." Mexico, 1829: p. 107. Jones's Report on Land Titles in California, p. 13.

† MSS. Archives in possession of the Surveyor General. Figueroa's Manifesto, p. 11. Jones's Report, p. 14.

The proof here stops; and I contend that the Government having proved so much, ought to prove more; or rather that it cannot be inferred from the proof which is in, that the approval was not given; but the contrary. *First*, because it was the duty of the Committee, after the recommitment, to make an amended report, according to their instructions, and the duty of the Deputation afterward to act on the report; and the inference of law, there being no proof or semblance of proof to the contrary, will be that those officers performed their duty. *Second*, because it was the evident intention of the Deputation to approve the grant; and that the recommitment was only intended to *perfect* the report. What was the nature of the amendment we have no means of knowing. The book of proceedings of the Deputation is not produced, as it ought to be, being the best evidence, or its absence accounted for. The book, however, does not exist, and hence we have no means of knowing what the proposed amendment was; but whatever it was, an amendment is always designed to improve, to perfect; and an intention to destroy cannot be argued from directions to amend. The books and records are not extant; the actors in the matter are either absent or dead (as shown in the testimony of Pacheco); and, as it was properly begun, there is no rule of law that will argue from mere inference, that it was not properly finished. Whatever means of proof do exist, exist in the hands of the Government; they never were in the hands of the claimant; he is not responsible for their non-production; nor for their loss; and who will undertake to say that if all the records for 1836, 1837, 1838, up to 1846, when the Departmental Assembly finally dissolved, if those records were produced, this approval would not appear? It devolves on the party denying it, and especially where that party has all the proofs that exist in his own hands, it devolves on him, to prove the omission. The record, as far as it goes, is now, and has been for years back, in the general archives; no longer in those of the committee; back among the archives of titles, and embraced in the list of "*adjudicated* lands."

2d. If however, the grant was *not* approved by the Deputation, it could only have been from *neglect* on the part of the officers of the Government. The grant was in every respect proper; there was no reason known to the law, or to the policy or custom of the country, why it should not have been confirmed; every reason of law and policy combined, why it should have been; and if it was not approved, the cause was in that civil revolution which at the moment the grant was before the Deputation, broke up the proceedings of that body, and in the subsequent neglect of the successors of that body to take up its unfinished business. From this neglect or forgetfulness on the part of the agents of the grantor, the claimant cannot lawfully and ought not to suffer.

Let us, however, examine what is in fact the nature of this apprabatory function of the Territorial Deputation.

By Section 1, of the Mexican Executive Regulations of 1828, the Political Chiefs of the Territories were authorized to *grant lands*—"*conceder terrenos*"—to *empresarios* (that is, contractors to bring in colonists) and to private persons. Section 2, 3, and 4 point out the preliminary steps, and the mode of making concessions. Section 5, declares that concessions made to individuals shall not be held "*definitively binding*," or, as it may be translated, *definitively valid*, without the consent thereto had of the Deputation. Section 6 declares that when the Political Chief shall "*fail to obtain*" the approbation of the Deputation, he shall report the case to the Supreme Government, for its determination; that is, he shall appeal, on behalf of the grantee, from the Deputation to the Supreme authorities.

The necessary corrollary is, that it was the business of the Governor to *make the grant;* that the Deputation had the power to affirm it, and thereby render it definitive; or they had the power to *refuse* their affirmation, and thereby throw the final determination of the grant on the Supreme Government.

Two further deductions also follow: 1st. That the Deputation *could not destroy a grant;* 2d. That after the making of the grant, by the Governor, no other power, not even the Supreme Government, could interfere with it, to question its validity, *pending the action of the Deputation.*

Whilst, then, the Territorial Deputation of California existed, it had power over grants of the nature of the one now before the Board, to this extent, to wit: definitively to *affirm* them, or qualified to *negative* them: pending this action, and until a direct refusal of affirmation, the grant continued subsisting and valid, without power, on the part of any other functionary or authority, to question or interfere with it. Consequently, on the dissolution of the Deputation, without exercising that qualified negative, the grant necessarily became absolute, because there was no longer any person or body to whom the power had been reserved to question it.

It is certain that the concession spoken of in the law, had vitality—had validity—immediately on being made by the Governor. This follows from the positive terms in which the granting power is given to the Governor, and to him alone; from the usage and custom of the country, as is shown in the proof, and which is likewise contemporaneous exposition of the law; from the objects and policy of the law; and from the qualifying word *definitively* applied to the validity which the approval of the Deputation should confer. It must have had some kind of validity before, since it was now to be made *definitively* valid or binding.

The Attorney of the Government attempted, with great ingenuity, to erase this word *definitively;* but it is full of meaning and is inserted for a purpose, and to strike it out would change the character of the law, and, as we shall see, reverse its purpose.

Now how was this original vitality and validity to be destroyed? It could only be destroyed *by the concurrent action of the Deputa-*

tion, begun by the Deputation, and of the Supreme Government affirming that of the Deputation ; because, from any negative action of the Deputation, the Supreme Government reserved an appeal to it itself ; but did not reserve any original right of negation. It follows, then, as stated above, that when the only tribunal that had power to originate a negative action has ceased to exist, that negative action has become impossible, and the grant per force absolute.

Again, the grant is made by the appointed agent of the Government. It was made according to law ; but it is not definitely binding till it has gone through another prescribed process. It is not definitely binding, because it may still be reviewed, annulled. But it can only be reviewed in a particular way, by a particular tribunal ; and can only be annulled by the Government itself, after being *thus* reviewed. Now when that particular mode of reviewing the title by that particular tribunal, becomes impossible, the control of the Government over the title is gone, because it did not reserve any other mode or means. The decisions which may be made, by this Board in favor of claims, will be *valid* certainly ; but not definitively binding on the Government of the United States. The cases will still be in the control of the government for review and possibly reversal ; but in its control only through a particular mode and means. Should that control, in the particular prescribed way, in the exercise of a just discretion on the part of the agents of the government, be not availed of, or even in any way become impossible, then the control of the government is gone—gone absolutely—gone definitively—gone forever—and the decision of the Board becomes absolute.

The Mexican government did not then reserve any power to negative grants to individuals, made by its territorial Governors, except when the same should be first disapproved by the territorial deputation. Its policy was, to have the lands distributed ; distributed by secure titles, and with as little expense and trouble as possible to the grantee ; hence, it was not its policy to hold titles in suspense, or reserve questions concerning them for settlement at that remote capital, except where the local council, by disapproving a grant, should raise a just doubt of its propriety. Hence, that government did not reserve any other power over grants once made by its Governors ; nor any other means of reaching them ; and hence, I say, that that means being abrogated, or become impossible to be exercised, the grant stands divested of that reservation to its difinitive validity.

It is easy to perceive the object of these provisions. It was the intention of the Mexican Government, that the settlement of the territories should be made conformably to the views of the central authorities. Hence the law gives the central executive control over the peopling of the territories ; and the regulations depute the exclusive granting power to an officer who held his appointment from Mexico, came hence impressed with the wishes of the central government, and was responsible to it for his conduct. At the same time a sufficient check was placed on the Governor's otherwise absolute discretion to secure the rights of the native population of the territory, and to give the government notice of abuses. The qualified negative reserved to the deputation—accomplished that object; but any power in the deputation beyond that qualified negative, would have defeated the purpose of the government. Because an absolute negative given to the deputation, or, what is the same thing, if their positive concurrence had been made necessary to the vitality of the Governor's concession, then the whole power would be virtually taken out of the hands of the Governor—the federal appointee—and he compelled to fall into the views, however narrow and exclusive, of the local council; or the granting power come to a dead lock. Neither of these alternatives was consistent with the plan of the Central Government. It was not consistent with the paternal policy that the people of California should be deprived of a just participation in the distribution of the domain of their territory, by a Governor coming from abroad, and having perhaps no sympathy with them; nor, on the other hand, was a controlling power in the hands of the local functionaries, consistent with its enlarged views which that government ever entertained, but had never energy or consistency to carry out, of peopling this country with whatever enterprising population it could invite to it, and opening that commerce with Oceanica and Asia, which is just now, under other auspices, spreading its pinions.

Under this view of the policy and intent of the law, it is thoroughly consistent, and its provisions well framed and adapted. But let us look at the consequences of the construction now attempted to be given to the functions of the deputation. If this construction be correct, that body had by implication, and might always have exercised, what was denied to it both by the policy and letter of the law. If the concession made by the Governor had no inherent validity—no vitality till the breath of life was given it by a positive vote of the deputation—then the deputation, by mere inaction—by mere letting alone—was able to tie up the hands of the Governor, hold the lands vacant, cut off the Supreme Government from its reserved right of final decision, defeat the grant, defeat the views of the government, and defeat the policy of the law. This would be a "masterly inactivity" with a vengeance. Powers may and will be sometimes implied to carry the purposes of law into effect, but not to defeat its benevolent intentions, or enable inferior functionaries to circumvent the reserved powers of the superior.

But the 5th and 6th sections of the Regulations, besides a qualified restriction on his acts, impose also a *duty* on the Governor, viz: to *obtain* for the grant the approval of the deputation; or, failing that, to report the case to the Supreme Government for its final action. Now, I submit, that, in the absence of any proof to the contrary, it must be presumed that the Governor performed this duty, and did either obtain the approval of the deputation, or that of the Supreme Government. And while I think that this is a presumption which the law will per force give us the benefit of ,I think the long quiet possession under claim of title, with knowledge and acquiescence of the government and the public, and all the authorities, establishes, in point of fact, and amounts to a declaration on the part of the government that the grant had been completed.

Finally, we have shown that the usage and custom of the country was that grants should be valid and subsistent from the time of the Governor's concession, as is indeed expressly enacted in section 22, of the Colonization Laws, of 1823, and which has never been repealed, except so far as it is inconsistent with subsequent laws. The repeal of old laws is not effected by the enactment of *different* provisions—the new provisions must be *contrary.* 7 Mar. La. Rep., N. S. 434.

The usage and custom, however, is sufficient for us, for this usage and custom is made positive law by the act of Congress creating this Commission. Mitchell's case, 9 P. 734; Strother v. Lucas, 12 P. 436. Smith *v.* U. S. 10 P. 329.

In Arredondo 6 P. 714, 715, the Supreme Court takes notice of, and acts on the usage and custom of the province, though this is not prescribed as a rule of decision for them, in the act of Congress conferring the jurisdiction. Because, usage and custom, say the Court, are a *part of the law.* That the proceeding would be a *mockery of justice* if Congress had intended to exclude from their consideration "usage and custom, which are the law of every government."

V. THE "TEN LEAGUE" QUESTION.

1. The question does not arise in the present case, because it is in proof that the land does not lie within ten leagues of the coast.* As for the position taken by the Law Agent, that it has been judicially proved in the proceedings *prior* to the grant, that the land does lie within ten leagues of the coast, and hence cannot now be disputed, I take the true doctrine to be this, to wit: that the inquiries and investigations made by the Governor, prior to the concession, are, in fact, in the nature of an inquest of office; that, as in any other inquest the *particular facts* reported, as for instance this one, of the ten leagues, are not conclusive of the fact, but that

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* The petition of the claimant in this case, to the Governor, soliciting the land, was referred, according to the custom of the time, by the Governor to the Ayuntamiento of Monterey, to report in regard to the locality and character of the land, the fitness and claims of the petitioner, &c. The Ayuntamiento reported, among other things, that the land was within the ten littoral leagues, concluding with the opinion, however, that it was proper to be granted. Proof before the present Board, shows the report of the Ayuntamiento touching the locality of the land with reference to the sea coast, to have been erroneous. The Law Agent contended nevertheless, that by the report of the Ayuntamiento the question of locality was judicially ascertained and could not now be inquired into.

the *result*, which may be likened to a verdict or judgment, is conclusive; and the sum of the report, when adopted by the Governor and acted on, becomes *res judicata.* It cannot be said, that each particular fact or opinion reported, is a fact judicially found, because (if for no other reason) the different functionaries to whom the subject was referred, might very well, and in fact often did, make diverse reports: as in this case, one of the witnesses estimates the land to be a league and a half, another a league, &c. The particular facts and opinions, therefore, which are reported, are not to be taken as proved; and we cannot know what particular ones of them were received by the Governor to determine his judgment that the grant was proper to be made. But the inquiry itself is to be taken, as before stated, as a judicial inquiry, in the nature, as held by the Supreme Court, of an inquest of office at common law, and its result—that is, the propriety of the grant—to be *res judicata.* In *Mitchell's case*, 9 Peters, 711, the claimant held under a grant from the Governor of Florida, of lands that were in the occupation of the Seminole Indians at the time of the grant. The grant was conditioned, that the grantee should not alien the lands without the consent of the Government. In 1817, the grantee applied to the Captain General of Cuba for this consent. The Captain General referred the matter to the Assessor General of the Province for his advice, and he reported that the lands had been lawfully granted, in full property; and upon this report, the permission asked for to dispose of the land was given. Before the Supreme Court, it was contended on the part of the United States, that the lands being Indian lands the grant was not within the functions of the officer making it, and was consequently void. The Court held, that the proceedings before the Assessor General was in the nature of an inquest of office, in analogy to the writ of ad quod damnum, which by the common law precedes the grant of any charter or patent by the King, and that the report of the Assessor General being acted on by the Captain General as on an inquisition at common law, the Court would not go behind it, to presume that those officers had exceeded their powers. And more especially will the rule hold good in the present case as to the result of the inquiry when acted on by the Governor, if it be good to the extent argued by the Law Agent. It was in view of the whole, and such *other matter* as he judged proper, that the Governor acted and made the grant, as will be seen in the decree of concession.

2. The clause in the Mexican Colonization law of 1824, which prohibits lands to be colonized within twenty leagues of coterminous nations, and ten of the sea coast, is not intended as a general prohibition of grants of land; but refers only to *foreign colonization*, and is applicable to the *States* only, not to the Territories, of the Republic.

Mexico did not intend to leave her sea coast unpopulated—a derilict, open to foreign invasion, and the incursions of adventurers;

or those settlements already established on the sea-board unstrengthened and unreplenished. The suggestion is too absurd to be entertained; and if it be contrary to every motive that can be supposed to actuate a government, it is especially contrary to the policy and wishes of the Mexican Government, whose immense extent of sea coast on the two oceans, and long line of exposed frontier on the borders of the United States, made her particularly solicitous for their population and defence. The statute books are filled with laws and decrees in encouragement of this object.

We shall better understand the policy of the law of 1824, if we consider the circumstances under which it was passed. Mexico after achieving her independence, stimulated by the prosperity and progress which she beheld in the United States, and anxious to strengthen herself against further attempts, then still apprehended of subjugation by Spain, determined on a departure from the old restrictive ideas of the Spanish metropolitan government, and to adopt a liberal policy toward the people of other nations, as a means to replenish her sparse population by American and other foreign colonists. To this end was enacted the broad foundation of the colonization law of 1823, by the government of which the Emperor Yturbide was the head. (This law was enacted 4 January, 1823, and published in California 14 July, 1823). On the abrogation however, of the consolidated government, and the establishment of the federative system, that law was suspended, and on its re-enactment 17 August, 1824, it appeared with the restriction under consideration, and other restrictions, prompted by jealousy of foreigners, and a desire to retain powers in certain particulars in the Supreme Government. The structure of the law exemplifies the mingled feeling of desire and distrust which actuated its framers: desire to strengthen the resources of their country by an infusion of foreign enterprise and energy, and distrust and jealousy of the means by which it was to be effected. The motive of the restriction, however, by which the Central Government sought to retain in its own hands the control of so important a matter as foreign colonization of the sea coasts, is easily perceived; since through this sea board it must derive a large part of its revenue; through this only (or the border leagues which were included in the same rule) could it be attacked by foreign powers, or could foreign colonists combine with their former governments, or the States themselves combine with foreign powers or individuals against the integrity of the Republic. But the same considerations that would lead to this distrust, and this restriction on the settlement of foreigners within the said leagues of the sea, would lead to the promotion and encouragement of settlements of native citizens. Hence, we shall find, how extremely solicitous the Mexican Government was to this end. To show that this was the cherished policy of Mexico, I will quote, first, the law of 6 April, 1830. This law (section 7) offers to Mexican families who will go to colonize the frontier States, payment of the expenses of the voyage, maintenance for a year, and donations of lands and agricultural implements. Section 13, opens for the encouragement of this emigration the ports of Galveston and Matagorda to the free introduction of houses and provisions. Section 12, permits the coast trade to foreigners for the space of four years, to facilitate the transportation of the effects of such emigrants to the ports of Tampico, Matamoras, and Vera Cruz; appropriates half a million of dollars for establishing settlements and fortifications on the frontiers, and conducting thither and sustaining on their arrival Mexican families and *presidarios;* forbidding at the same time the colonization of any part of those frontier States (not alone the ten or twenty leagues but any part) by foreigners of nations adjoining thereto. In pursuance of this law, the government in carrying it into execution, made in repeated circulars and orders, the most liberal arrangements to facilitate its objects, and particularly to establish a settlement at Galveston. I refer to the Circular of 21 November, 1830,* and the Regulation of 3 May, 1833,† from which it will be seen that every means in the power of the Government, was adopted to effect the object spoken of. Again, the decree of 4 February, 1834,‡ manifests a like solicitude, and proposes a large expenditure for (among other objects) the same great one of establishing Mexican families in the frontier State of Coahuila and Texas, and of "consulting the security of the frontiers," especially designating for such colonization the lands on the divisory line of the Republic.

Again, a law of 22 May, 1827, within three years of the date of the Colonization Law, and passed by a Congress composed nearly of the same members as that of 1824. This is a law for the *express purpose* of encouraging the formation, preservation and increase of settlements on the coasts, and as it is short I will quote it.

"1. The importation of lumber, free of duty, is permitted for the term of two years, for the sole object of forming, conserving or augmenting settlements on the coast, in the extent of twenty littoral leagues.

"2. Are equally free of duties such national lumber [or, timber of domestic production,] as shall be directed to the objects spoken of in the foregoing article."

The statute book is full of such laws. Here is one of Mexico for the organization of the civil militia, with provisions for defence of the ports and points on the frontiers; adopted 29 December, 1827. (Arrillaga April to July, 1833, p. 24.) Here is one of 8 May, 1828, for establishing six companies of permanent cavalry in Upper and Lower California; and distributing their respective forces, one company at San Francisco, one at Monterey, one at Santa Barbara, one at San Diego, one on the frontier of Lower California, and the sixth at Loretto. (Arrillaga 1828, p. 118.) Now this military was intended for the protection and security of the inhabitants of the settlements, established and to be established; but the construction attempted to be given to the 4th section of the Colonization Law, would separate the military from the settlements; place the latter exposed and defenceless in the interior, among the wild and savage tribes; the former, isolated and useless on the coast. The absurdity of this suggestion is sufficient to condem it. It was unity not division; strength not weakness; that the Mexican government was seeking in all these enactments. Again, the statute book is full of instances, for the exclusion of *foreigners* from the coasts and frontiers. There is one of 30 April, 1828, directing all Spaniards living on the coasts of the Mexican gulf, to retire inland twenty leagues. The immediate cause of this decree was the anticipated approach of a Spanish squadron of invasion; but Mexicans were *not* ordered to retire, because, on the contrary, they were wanted on the coast to defend against the threatened danger. The 1st section of the law of 6 April, 30, as already shown, prohibits settlements by foreigners of coterminus nations in any part of those States which should border on such coterminus nation. The law of 14 March, 1842, enacted to allow foreigners to purchase and hold real property, restricts them to within five leagues of the coast, and forbids their settlement in the States which border with other nations. In 1837 the agents of Mexico entered into a convention with her creditors in London, to appropriate a large part of her vacant domain to the payment of her debts, and to convert her bonds into land warrants. In 1839, this convention was ratified by the Mexican Government, but with such reservations as entirely to exclude from the frontiers and coasts the foreign emigration which the circulation of those warrants was expected to bring in: section 4 of the act of ratification, prescribing that the government should take care, that the *frontier lands* should not be assigned to any subjects of coterminus nations, who might happen to get hold of the warrants; section 5, that the premiums offered to the independent army (of the Republic) should be given in the lands of Yucatan and the Californias—the exposed territories of the sea board; that the concession promised to certain Indian tribes should appropriate the extreme frontiers; and that the premiums to co-operators in the proposed recovery of Texas, should embrace the lands on the coasts of the Mexican gulf, within twenty leagues of the sea. All these provisions are at once premiums on the settlement of the coasts and frontiers, and restrictive of their colonization by foreigners.

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* Arrillaga's Collection, April to July, 1833, p. 136.

† Ibid, p. 132.

‡ Arrillaga 1834, p. 47.

Here, in California, a distinguished citizen, General Guadalupe Vallejo, was commissioned in 1835, to found a settlement on the northern frontiers and coasts of this territory, for the express purpose of arresting the progress and forming a barrier against the Russian settlements of Bodega and Ross, which appointment, and the proceedings under it were approved by the Central Government in 1839, and the desire expressed that the settlements should continue to increase "for the object mentioned." These documents are contained in the papers accompanying my Report on the subject of Land Titles in California, Senate edition, page 81. These documents also illustrate both positions, viz: that, the restriction was aimed at foreigners alone; and that settlements of native citizens was an object of encouragement and solicitude.

All these, and many other acts which I might enumerate if it were necessary, exemplify the policy of the Mexican Government, which led to the 4th section of the law of 1824; and show that that policy was, to draw colonists from foreign countries, into the interior; and establish native settlements between them and adjoining nations, and between them and the sea coasts; and this being so evidently the policy of the law, why shall we go behind it to interpolate an absurd proposition contrary to it?

Having, as I think, shown what was the policy of the law of 1824, I now invite attention to the proper construction of it by its own terms.

The subject of the law is declared in its title, to wit, *Colonization*, and colonization implies *immigration*, and does not apply to a native or resident community. There may be domestic colonization, as a colony coming from another part of the same nation; but the word necessarily implies immigration of some sort, and the first section of this law shows what kind of colonization is here intended, namely, *foreign colonization*.

The subject, then, being *Colonization*, the first section of the law declares what class of *persons* is intended to be embraced in this colonization. The second section declares what description of *lands* are embraced in it. The third section directs the Congresses of the several States to make their particular rules for the regulation and reception of that colonization. The fourth section restricts the power of the States with respect to such colonization (without the previous approbation of the federal executive) in certain portions of their territories. The fifth section still further restricts the power of the states in the same particular, by authorizing the federal government to make reservations for public purposes. The sixth and seventh sections are designed to assure foreigners who may propose to avail themselves of the offers of the law, of its permanency and of good faith in its administration. The 8th section is a reservation on the part of the government of a right, notwithstanding the preceding, to take measures for the security of the federation as against those foreigners who may be admitted to colonize.

The ninth section is the first one that speaks of Mexican citizens, and this, and the two following sections, are inserted in this connection, in my opinion, as a limitation to the colonization spoken of in the preceding ones, and are intended to declare that foreign colonists shall not be admitted to the prejudice of the objects expressed in these 9th, 10th and 11th sections. And here I ask attention to the change in the phraseology of the law, which occurs at the introduction of these sections. In all the preceding sections, *colonization* is spoken of, and *foreigners* are the persons alluded to. At the 9th section, the term colonization is dropped, and the *distribution of lands* spoken of. And, this, for the good reason that to have employed the term *colonization* in reference to the subject matter of these sections would have been an absurdity. Yet it is *colonization* only, as referred to in the 1st, 2d and 3d sections, and not the *distribution of lands* spoken of in the 9th, 10th and 11th sections which is restricted by the 4th section, within the twenty limitary and ten littoral leagues, and I submit that when foreign colonization is the subject matter of the law, and the whole subject of one part of it, and the distribution of lands to citizens is prescribed in another part of it, and a prohibition is inserted in connection with those sections which treat exclusively of colonization, and the prohibition expressly mentions colonization, and does not mention the other, that other, that is the distribution to citizens, is necessarily excluded from its operation. "*Expressio unius est exclusio alterius* is a universal rule in the construction of statutes." *Arredondo's case*, 6 *Peters*.

To continue the analysis of the law. The 9th section is the first in which Mexican citizens are referred to, and this prescribes as a limitation on the operation of the preceding ones, that the distribution of lands to citizens shall have preference over the colonization which those preceding ones treat of, and then directs the rule which shall govern that distribution. The 10th and 11th sections treat also of the allotment of land to Mexican citizens, military and others, who may have become entitled thereto by special services or contracts. And here if we refer again to the decree of 4th February, 1834, we shall find that the classes of persons treated of in these 10th and 11th sections of the act of 1824, are the very classes whose settlement on the frontiers was most desired. The 12th, 13th and 15th sections lay down some general rules apparently intended to apply to all subsequent acquisitions from the public domain, and accordingly their phraseology applies to all titles however derived. Section 14 is for a further assurance of the colonization contracts treated of in the beginning. The 16th and last section will be noticed in a subsequent branch of the argument.

Another point of view in which we may look at this law, is this: as prescribing rules for the distribution of the public domain in three different channels: namely by foreign colonization; by gratuitous distribution to citizens; by distribution to citizens in discharge of government obligations. In the rules prescribed for foreign colonization, the restriction is inserted; in the rules prescribed for the other modes of distribution it is *not* inserted. By what ingenuity, and to what end can the law be tortured so that the prohibition can be supposed to apply where it is expressly omitted, and where it would defeat its express intent?

But besides being only applicable to foreign colonization, and not to the distribution of lands to citizens, the clause had no relation to the *territories* of the Republic, only to the States; the scope and object of the law is to prescribe general rules and principles to govern the particular Colonization Laws which were to be adopted by the Congresses of the States. Looking carefully through the law, we shall find that the territories are but twice mentioned in it, namely, in the 11th section where it is enacted that a certain class of public burdens shall be borne by the lands in the territories, as a counterpoise to other public burdens which are required in section 10, to be borne by the lands of the States; and again in section 16, which requires the government, (meaning the federal executive) to proceed to the colonization of the territories. In addition to this, if we examine together the 3d, 4th and 5th sections of the law, we shall find that they all refer to the same lands, and these the lands of the States. Section 3 requires that the Congresses of the States, to the end expresed in the two previous sections, shall form Rules for Colonization within their respective limits. Section 4 prescribes that without the assent of the federal executive, lands within the twenty limitary and ten littoral leagues shall not be colonized; that is, as I interpret it, shall be excepted from those rules which the States in the preceding section are required to adopt; and section 5th fixes that interpretation, because it enacts that for the purposes therein mentioned, the federal government may reserve and use portions of THOSE LANDS—*estos terrenos*—that is, of the lands immediately before mentioned, and which must mean lands of the States, since it would be idle to enact that the federal government might reserve lands for public uses in the territories, when the territories were held as its own property. But again, section 16 makes it the duty of the federal executive to proceed to the colonization of the territories. To what end enact in the 4th section that certain portions of the territories should not be colonized without the consent of the federal executive, when the 16th section refers the whole business of the colonization of the territories to the same executive? This last section of the law of 1824, in my opinion, necessarily withdraws the laws of the territories from the operation of the restriction contained in the 4th section; since if no part of the territories could be colonized without the previous approbation and consent of the executive, of course, the ten littoral and twenty border leagues could not be. He is no more charged with the colonization of one than of the other.

We shall arrive certainly at this conclusion if we consider what is the effect of this 4th section. It is in the nature of a restriction on a general permit, and its object and effect is to limit the discretion of some one—of some one, to whom the duty of colonization was confided. Now, the duties of colonization in the States, was confided to the Congresses thereof; and the duties of colonization in the territories was confided to the federal executive. The 4th section is not intended to limit the discretion of the latter, for, on the contrary, it enlarges his powers; it is, then, intended to limit the discretion of the Congresses of the States, and of course can only apply to the States.

Under the general law, foreigners were never permitted to settle or own property in the Spanish American possessions, and until the Colonization Law of 1823, before spoken of, there had been no such thing known in the provinces composing the new empire of Mexico. The gratuitous distribution of land to native born subjects, however, was no new idea, and required no new laws to authorize it. It was a faculty inherent in the executive office, and had been constantly exercised for three hundred years, by the chief political authority, wherever there was a Spanish province. It had been exercised by the Viceroy of Mexico, and every chief of province under him since the conquest. The Colonization Law, therefore, was not intended to create that power; and hence the distribution of lands to citizens is only incidentally mentioned, as a restriction on the new faculty created, namely, that of granting to foreigners. The federation did not pretend to own the vacant lands of the States, and did not attempt or pretend to regulate the mode of distribution to citizens. The States had already all the powers over them, that were given by proprietorship, and were consistent with the general laws of the Republic. There are repeated laws in which this right of property of the States in their vacant lands is expressly recognized. I will only refer to that of 6 April, 1830, and that of 25 April, 1835. It was not competent, then, for the General Government, even had that been its design, to limit the authority of the States in the uses of their domain according to the existing policy and laws, nor to take away functions already possessed by the States. It could not limit or control their right to distribute and grant lands to their citizens, because that was a function already possessed by the States, and consistent with the policy of existing laws. But in introducing a new law, connected with the exterior policy of the country, which was peculiarly in the province of the Central Government, it might well and properly prescribe limits to the privileges of the States in respect of it, and reserve to itself such part of its management as it judged expedient.

The first act to admit foreigners to settle and hold real estate in Mexico, was that before mentioned of 4 January, 1823. It contains no other restriction than that natives of the country, and particularly the military, shall be preferred in the distribution of lands. The ten league restriction was not necessary in this law, even if the same policy and ideas prevailed, because under it—the federative system not then existing—the whole administration of the law was in the hands of the central executive; and it would have been as idle to enact in that the restriction of the 4th section, as now to interpret that 4th section to apply to the territories.

This Colonization Act of 1823 was followed 7 October, same year, by an act to repeal all the laws which prohibited foreigners from holding shares in mines. This was adopted to procure the introduction of foreign capital for the resuscitation and rehabitation of old mines.

Next followed the Colonization Law of 18 August, 1824, introducing the restrictions we have noticed.

Some other restrictions are introduced in the passport and naturalization law of 12 March, 1828, as also some additional privileges. This law also (section 9 and 10) in establishing a new law, partly to be administered by the States, adopts certain rules to govern that administration. Those sections provide that unnaturalized foreigners may propose for the purchase and colonization of lands of private ownership, but to obtain the privilege, must have the special permission of the General Congress; if the purchase and colonization should be in the territories, and of the particular Congresses, if in the States; that the particular Congresses might give this permission or not, as they chose, and impose such conditions as they thought proper; but stipulating the following which should serve as a basis for every contract of the kind, with the understanding that the legislatures might narrow them but could not amplify them, to wit: 1. That the fourth part of the colonists should be Mexicans. 2. That within seven years the estates should be divided into small tracts. 3. That the empresario not naturalized should not reserve a tract exceeding sixteen square leagues, and that this should be sold within twelve years, counting from the time in which the estate ought to be divided.

The next law touching the subject is that of 14 April, 1828, prescribing rules for letters of naturalization, the 13th and 14th sections of which enact, 1. That every empresario who comes to colonize, in accordance with the law of the State where he may settle, shall have a right to ask for a letter of naturalization, which shall be conceded to him, he taking an oath of obedience to the Constitution and Laws. 2. That colonists who come to settle the colonizable lands shall be held as naturalized at the expiration of one year from their establishment. These sections relate of course to persons who may come in under the Colonization Laws, and show the sense in which the term colonists is used.

The 11th article of the act of 6 April, 1830, as already shown, again makes a very material restriction, that of prohibiting the States which border with other nations from colonization by citizens of such coterminous nations.

The act of 21 November, 1833, repeals that restriction.

The act of 25 April, 1835, makes another very material restriction, no less than forbidding absolutely the States of the frontier and of the sea coasts from aliening their lands for the purpose of colonization until rules should be established to govern it.

This section, again, shows the sense in which the term colonization, in the Mexican law, is to be understood; for it cannot be supposed that in this enactment the Mexican Congress intended so suicidal a policy as to stop *all* acquisitions of land from the domain of the border States; but the object of the law was to prevent their settlement by emigrants from abroad. The point, however, does not stand on this hypothesis alone; it is, demonstrable that the terms are used both in the law under consideration, and in that of 1824, in regard to immigration alone, and that foreign immigration. The following is the section entire:

"In use of the power, which the General Congress reserved, in article 7, of the said law of 18 August, 1824, the border and coast States are prohibited from alienating their vacant lands for the purpose of colonizing them, until rules shall be established which they shall observe therein."*

Now the faculty reserved by the General Congress, in said article 7, law of 1824, in exercise of which the above section is enacted, extends only to the right of prohibiting the entrance of foreigners—"*la entrada de estrangeros*"—for the purpose of colonization. It does not reserve the right to prohibit grants to citizens; and we must interpret the power exercised, with reference to the power reserved; and conclude that the term colonization, as understood by those law makers, was equivalent, in the act of 1835, to the term "entrance of foreigners to colonize," in the law of 1824. Again, in the section quoted from the law of 1835, the prohibition is not against the *alienation* of their lands by the States mentioned, but against their alienation, *for the purpose of colonization;* and the latter branch of the provision evidently qualifies and limits the former.

The restriction contained in the 4th section act of 1824; that contained in the 11th section, act 6 April, 1830, and that contained in the law under consideration, of 25 April, 1835, must be understood as of the same subject matter; as relating to one and the same thing; the first named, as restricting foreign colonization within ten leagues of the sea coast, and twenty of border nations; the second as prohibiting the colonization by emigrants from border nations of the States with which such nation bordered; the third as prohibiting any foreign colonization of the border and coast States.

To resume our summary of the fluctations of the law in the particular under consideration.

The act of 4 April, 1837, revives the restriction contained in that 6 April, 1830.

The decree of 14 March, 1842, again extends the privileges of foreigners in regard to rural property, and with the exception of the border and coast departments, gives them nearly the same rights as citizens in the acquisition of real property. The 9th and 10th sections of this law I invite particular attention to, and assert without hesitation that, taken in connection with them, the 4th section of the law of 1824 will not bear the interpretation attempted to be given it by the Law Agent.

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* "En uso de la facultad que se reservo el Congreso general en el art. 7° de la citada ley de 18 de agosto de 1824, se prohibe a los estados limitrofes y litorales enagenar alguna parte de sus terrenos valdios para colonizar en ellos, hasta qué se establezcan las reglas que deben observar para hacerlo."

The 9th section provides that the provisions of the law (that is, the extention to foreigners of the right to hold real estate,) shall not include the border departments, with respect to which special laws of *colonization* shall be issued, provided that foreigners shall never be able to acquire property in them, without the express license of the Supreme Government of the Republic.

Section 10 provides that in those departments which are not border, but which have coasts, foreigners can only acquire lands at a distance of five leagues from the coast.*

The restriction contained in these sections are, in my opinion, to be taken as a part of the same system of legislation, as those quoted of 1824, 1830, 1835 and 1837, and the general term *colonization*, as used in the 9th section, must be understood solely in connection with the introduction of foreigners and the acquisition by them of real property, and the provision with which the section closes, that in the border States foreigners shall never be permitted to acquire lands without the express license of the federal executive, is only re-enacting in a larger extent and with additional rigor the restrictions of 1824.

The 18th section of the Colonization law of 1823, and the 9th section of that of 1824, both provide specially that in the distribution of lands *Mexicans shall be preferred*, (that is, be preferred over foreigners). This is also consistent with common sense, since every man, in the distribution of favors, prefers his own household, and every nation its own citizens; and none more than Spain and Mexico, under whose laws the admission of foreigners to hold real estate, is an exception, not a rule. But if the construction now sought to be given to the 4th section of the law of 1824, be correct, and it was intended to embrace both foreign colonization, and grants to citizens, and to embarrass and restrain both alike, then by the operation of the law of 1842, instead of citizens being preferred, a discrimination is made in favor of foreigners; because, if the 4th section, law of 1824, applies both to foreigners and citizens, then both are restrained from acquiring lands within ten leagues of the sea; and the law of 1842, without any reference to citizens, or any concessions in their favor, admits foreigners to acquire within five leagues of the sea. The conclusion is inevitable, that, to the minds of the makers of the law of 1842, no such construction of the law of 1824 had occurred; for it is plain (if any argument be needed to such a proposition) from the whole tenor of the law of 1842, that, though it was framed for the purpose of enlarging the privileges of foreigners, it was not intended that they should enjoy the same license as citizens, much less be preferred to them. Thus while the first article prescribes that foreigners residing in the Republic, may acquire real property by purchase, adjudication, denouncement, or whatever title established by the laws, the third section provides that they shall not acquire more than two tracts in any one department, without license of the Supreme Government, and section 8 provides that the foreign proprietor who shall absent himself with his family two years, without license from the Government, shall make sale of his estates, or otherwise the Government will proceed to sell them; both being restrictions that do not apply to citizens. Again, section 9, as already shown, provides that the privileges given in this law to foreigners, shall not apply to the border departments, and even makes a perpetual rule that foreigners shall not acquire lands in those Departments, without special license of the Supreme Government; a disability that certainly does not apply to citizens. Again, the 9th and 10th sections taken together, and with the supposition that the construction given by the Law Agent to section 4, law of 1824, be correct, would involve this absurdity, that in the border Departments foreigners were entirely excluded, while in the coast Departments they were preferred over citizens.

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* The decree of March, 1842, here quoted, will be found in the Ordenanzas de Tierras y Aguas, page 64; but in the 10th section, by a typographical error, the pronoun standing for *costas* (coasts,) which ought to be feminine, is printed in the masculine, thereby throwing a shade of doubt on the meaning of the section. It is rightly printed, however, in the *Segunda Guia Judicial*, published in Mexico, January, 1847, and the meaning is unmistakably as above given.

The law of 1824, according to my understanding of it, may be paraphrased as follows:

The Mexican nation offers protection to the persons and property of foreigners who come to colonize within it, and for that purpose opens those lands of the Republic, which not being private property nor pertinent to any corporation or pueblo, may be colonized. To this end, as far as the States are concerned, the Congresses thereof shall make the necessary rules for the administration of this law within their respective limits; but they shall not administer it with regard to the lands which lie within twenty leagues of any other nation, or ten of the sea coast, without the consent of the federal executive, and if the federation should find it necessary to reserve any portion of those lands for public uses, it may do so. The nation undertakes, in further pursuance of the objects of this law, that within four years no duty shall be imposed on the persons of foreigners who come for the first time to establish themselves in the nation; nor prior to the year 1840 shall the General Congress prohibit the entrance of foreigners to colonize, unless under imperious circumstances with respect to the citizens of some particular nation; nevertheless the government may take such measures of precaution as it judges proper for the security of the federation against foreigners who come to colonize; furthermore, in the distribution of lands, Mexican citizens [who have heretofore had the exclusive right] shall still be preferred; and the colonization herein provided for shall not be so extensive but that soldiers who are entitled to bounty lands may receive them in the States, and other public servants with whom the Government may be able to compromise for lands may receive them in the territories; nor shall there be allowed to be united (under this law) in one hand, more than eleven leagues; nor shall the new settlers transfer their property in mortmain, nor hold it themselves, if they reside out of the Republic. Conformably to these principles, the Government will proceed to the colonization of the Territories.

From all the numerous laws which I have quoted, it will be seen that the Central Government of Mexico has always claimed and exercised control over the whole matter of the acquisition of real property by foreigners; to license or to forbid it, and to prescribe rules to regulate it. The books are full of legislation to this point; the law of 1824; the 11th section of that of 1830; the whole of that of 25 April, 1825, are samples of it; and the 12th section of that of 1842, above quoted, shows the Central Government so tenacious of this right, that, while it gives extensive privileges to foreigners in respect to the acquisition of lands, yet provides that they shall not be able to avail themselves of those privileges in any of the Departments, unless they contract with the government that "it possesses the right in representation of the Mexican nation."

But while this right of control over settlements of foreigners, and of their acquisition, in whatever way, of real property, has been thus constantly and jealously exercised by the Central Government, I have not found a single law in which that government has attempted to interfere with the discretion of the States (or of those Departments which, prior to the breaking up of the federation in 1835, were States,) in the disposition of their vacant lands for domestic occupation, or of any of the laws of real property as between citizen and citizen. Upon what ground can the 4th section of the law of 1824 be wrested from its position in this general system of legislation, and forced to apply to a subject over which the makers of it never claimed any control?

I shall now endeavor to show, that the same view which I have expressed of the effect of the 4th and 16th sections of the law of 1824, was taken by the federal executive of Mexico in the Regulations of 1828. Those regulations give there in advance the express consent and direction of the federal executive to all kinds of grants to all kinds of persons (embraced in the law,) in all parts of the territories, inside and outside of the littoral and border leagues, and appoint agents to carry out that express consent and direction, reserving only for a special review and permission that particular class of grants which I contend alone come within the purview of the 4th section of the law of 1824, to wit: grants to empresarios or contractors for bringing in foreign colonies; and providing only that they be vacant lands, and (for purposes of colonization) not occupied by Missions. Within or without the littoral and border leagues, the federal executive very properly reserved a right of review and negation on each particular grant for the object of a foreign settlement; and having made this reservation in one class of cases, it is necessarily inferred that in every other class mentioned in the regulations the consent therein given was full and unreserved.

Whatever view, therefore, may be taken of the force of the restriction contained in the 4th section of the law of 1824; whether it be conceded that such grants as the one at present before the Board were not embraced in that prohibition, or whether it be determined that Cruz Cervantes, born here on the soil and living on it ever since his birth, became suddenly a *colonist*, when he petitioned for a piece of land; whatever view may be taken of the reach of that section, its demands were fully complied with; because the consent of the federal executive was all that was necessary; and that consent was given in the instructions, without restriction as to locality, and to every description of grants, except those to empresarios; and the rule aleady quoted, that the insertion of one limitation excludes all others, applies and settles the construction.

The act of 1824 requires that Mexicans shall be *preferred* in the distribution of lands, and, as between them, residents in the place where the lands lie. The Regulations of 1828, were, doubtless, therefore, intended, in a large degree, for the benefit of the resident inhabitants of the territories. Now, as far as California is concerned, if the Regulations were only intended to operate outside the ten leagues, it would have been worse than a dead letter. The whole population lived on the sea coast; they were not strong enough to send out colonies or branches into the Indian territory; they rather needed nursing, strengthening and replenishing; and any contrary policy, such as holding out allurements for the emigration of the young and enterprising into the interior valleys, would have provoked an Indian war for which the territory was not prepared, and would probably have broken up the few struggling settlements that were here. The law was intended to have a practical, beneficial operation; to give the people of the country a chance of obtaining lands where they wanted them, and where they could use them; to keep families and settlements together, and give them a chance to grow; not to break them up and scatter them; to confer benefits, not to bring destruction; to populate and advance the country, not to lay it waste; and if, indeed, there be an ambiguity (which, for my part, I am not able to discern, however,) in the terms of the law, it is the duty of Courts, in the language of Judge Marshall, (1 Peters, 95,) in a not dissimilar case, to adopt that construction which would confer the bounty intended, and effect the benevolent intention of the legislature.

The Regulations of 1828 are entitled *General Dispositions*, not local or partial; Regulations for the Colonization of the Territories —all the territories, not parts of them.

The preamble gives the reason for the adoption of the rules, namely, because the 16th section of the law of 1824, makes it the duty of the Government to proceed to the colonization of the Territories—all the Territories, not portions of them—and shows that the powers therein intended to be exercised were co-extensive with that given in said 16th article.

The 1st section authorizes the Governor to make concessions—what of? "vacant lands of their respective Territories," without restriction as to locality, and under a law which provides for all parts of the Territories.

Section 7 reserves one particular class of cases; and this being the only reservation, it cannot be questioned that, with this exception, the President delegated his power as fully as he received it.

It would be more rational, more in conformity with the object of the law, and of those Regulations, in my opinion, to say that they were intended to apply *only* to the ten littoral leagues, than that these were excluded. More especially, if we view them in connection with the different laws for establishing the military, and with the Order of 1838, authorizing grants to be made of the islands of the coast. The military posts were all on the coast; and when the islands should be granted, and the present interpretation of the law be carried into effect, the country would present this curious spectacle; the islands populated; the sea coast in a width of thirty miles deserted, except three or four starving companies of military; and the settlements fighting for life with the Indians of the interior. How is this absurdity to be got over? how is this incongruity to be reconciled? I am curious, indeed, to hear, why, if an apprehension of foreign adventurers seizing the islands, induced the President to authorize the granting of them to citizens, the same apprehension should not induce him to authorize the peopling of the coasts in the same way? I am curious to hear, what "commerce and fisheries" they were which were to be endangered by foreigners seizing the islands, if nobody could rightfully or lawfully inhabit the country of the sea shore? I am curious to know, why ports were opened here, and custom houses established, unless the officers of the customs were charitably intended to console the military, in their solitude.

Is it not plain beyond doubt, that no new permission was considered necessary to authorize grants to citizens on the sea coasts; or that it would have been given for the same reasons, infinitely stronger, along with the authorization for granting the islands?

Again, these Regulations embrace all the Territories; and may be supposed to have been intended to operate in all of them. But, if the littoral leagues were excluded, we have seen how little operation they could have had, in Upper California: in Lower California, they could have had none at all, unless it was intended the inhabitants should desert the little valleys of the coasts, where alone, in that country, the means of life are attainable, in order to partake of the Government bounty by a grant of land on the summits of arid mountains.

But, under all circumstances, and under whatever view of the general provisions of the Regulations of 1828, I contend that the claimant in this case is secured and his rights recognized and provided for in the 17th section, alluded to in a former part of my argument, and which is as follows:

"In those Territories where there are Missions, the lands which they occupy shall not now be colonized, and until it be resolved whether they ought to be considered as property of the reductions of the neophyte-catechumens (communities of converted Indians), and Mexican settlers (or inhabitants.)

I do not know what construction the Law Agent proposes to give to this section; but to my mind it affords conclusive evidence that the Government discriminated, and intended to discriminate specially between colonization, properly so called, and concessions of lands to native settlers or inhabitants, and to recognize, at least for the present, the rights of the latter, to the exclusion of foreign colonization, in the lands occupied by the Missions. In a legal point of view, the Mission lands were undoubtedly the property of the nation; but a doubt if they ought not to be appropriated to the exclusive use of those classes who had worked them and protected them, led most properly to their reservation from colonization. The distinction is indeed drawn, in so many words, in this section, between the people of the country and colonists, and by all just rules of construction (to say nothing of the signification of words) forbids the confounding of the two. I construe the section, in connection with the other parts of the law, to mean, that while grants of all kinds mentioned in the first section might be made in the Territory generally, yet in the lands occupied by the Missions, colonization grants should not at present be made, nor until it was determined whether others than the Federal Government had not a property in them. What else can the section mean? It forbids colonization in those lands, certainly; but in the very act of prohibition recognizes the rights of native inhabitants; how were those rights to be protected except by grants, and how can a prohibition not to colonize, be construed to forbid grants to persons whose rights are thus reserved? This 17th section alone has always seemed to me to afford a conclusive construction to the act of 1824, and of the meaning in which the word colonization is used in it; and a complete answer to whatever might be said in support of the view of said 4th section now taken by the Law Agent. What else can the distinction mean which the section makes between colonization and the rights of native settlers? What else, but that colonization is forbidden, in order to protect more completely those classes of the native population?

We need not, however, rely alone upon the Regulations of 1828, nor upon the protection which the 17th section was intended to afford, to persons like the claimant. Whether or not, the Regulations of 1828, give consent to grants wihin the littoral leagues;

whether or not, colonization and grants to children of the soil mean the same thing; whether or not we receive the protection which the 17th section was intended to secure to us; there are abundance of other laws and executive orders which come to our aid.

The act of 17 August, 1833, providing for the secularization of the Missions of the two Californias, enacts, among other things, that all the lands of the Missions, except a cemetary and a lot of two hundred varas square for the use of the curate, should be turned over to the administration of the civil authorities. Now the mission lands were all located on the sea coast, or within a few leagues of it; and the secularizing of those lands and turning them over to the exclusive jurisdiction of the civil authorities, could be for no other object than to facilitate their conversion into private property, according to the principles of the secularization law of 1813, before quoted.

The act of November 21, 1835, repeals the prohibition contained in the 11th section of the act of April 6, 1830, which forbids the colonization of the border States, by inhabitants of the nations adjoining, and then enacts that the government may expend whatever amounts may be necessary in the colonization of the territories of the federation, and all other vacant places it may have a right to colonize, and as a part of this authorization includes the erection of fortresses on the frontiers. The scope of this law, then, embraces the whole extent of the border States, and all the territories, and authorizes the colonization of the latter (without exception as to locality,) under the sanction of the highest legislative act.

This general act was followed on the 26th of the same month, by a particular one, applying to the very locality in dispute, namely, the ten littoral leagues of California. This law empowers the government in so many words, to prescribe whatever measures will assure the colonization, and make effective the secularization of the missions of Upper and Lower California. And in pursuance of this authorization the government sent a special agent, with the office of Political Chief and Director of Colonization, and instructions to "make beginning," under the law, by occupying all the missions of the two territories. Now every mission of both Upper and Lower California was within the ten littoral leagues, and consequently, whatever lands the instructions of 1828 embrace, the present law and instructions cover the exact locality in question, and no other; and give the special assent, both of Congress and the executive to its colonization. It is true, the person to whom this appointment was given, and instructions were delivered, was superseded in his principal office, before he had an opportunity to enter on its duties. But neither the law, nor the instructions were ever rescinded, but were in force as long as the Mexican government existed in California.

Again, the instructions to General Vallejo, before noticed, to promote the settlement of the Northern frontier, contemplate grants upon the sea coast. They were given by Figueroa, without reservation. They were subsequently approved, as well as all proceedings under them, and General Vallejo encouraged to continue in the same labors, by the General Government. All this, without a word on the subject of the coast leagues, which would have been remarkable had it occurred to the General Government that Figueroa and Vallejo had been transcending the law in that particular.

I maintain, therefore, that the approbation and consent of the Central Government was given to the settlement of the coasts of California, in each and all of the acts I have quoted to that point, as fully as is possible for assent and approbation to be given.

But, apart from all this, the grant itself is *prima facie* evidence, and, under the circumstances, conclusive evidence, of the power of the officer who made it.

No Spanish or French grant has ever been refused confirmation by the Supreme Court, on the ground of want of power in the officer; nor on account of want of final ratification by the officer or tribunal thereto authorized.

The first Spanish case, decided by the Supreme Court, was that of Arredondo and others, reported in 6 P. 691. The grant was for four leagues to each point of the compass, from a common centre, by the Governor of Florida. The United States depended upon two points: 1. That the officer making the grant had exceeded his powers. 2. That a condition inserted in the grant to settle the tract with two hundred Spanish families, had not been complied with. The Court held:

1 That they were bound to decide the case "as between man and man."

2 That Congress had adopted as the basis of their acts in regard to their newly acquired territories, that the law of the province, [as evidenced by the usages and customs therein,] in which the land is situated is the law which gives efficacy to the grant, and by which it is to be tested, whether it was property at the time the treaties took effect. (p. 717.)

3 That the United States had never claimed any part of what could be shown by legal evidence and local law to have been severed from the domain. (Ib.)

4 That in their whole legislation, Congress had not enacted a solitary law requiring the claimant to produce the authority of the officer making the grant. That the United States were too just to exact from the grantees what no Court would require from one who held lands under a grant from the United States, or a State, if fully executed; or, if *inchoate*, never compels a claimant to produce the authority of the officer who issues the warrant. That it is presumed to be done regularly till the contrary appear. (p. 623, 24.)

5 That the United States never made the authority of the granting officer a point in issue between them and the claimants, "*to be even considered, much less adjudicated.*" (p. 727.)

5 That the authority of the granting officer is presumed by law, and is fully evidenced by occupation, enjoyment, and transfers of property, had and made under them, without disturbance by any superior power, and respected by the co-ordinate and inferior officers and tribunals of the state, province or colony, where it lies. (p. 728.)

7 That any objection to the admission in evidence of a public grant made in the name and assumed authority of the sovereign power, must be in the nature of a demurrer to evidence, on the ground of its not conducing to prove the matter in issue.

8 That if admitted, it must be received as evidence both of the facts it recites and those it declares, and of all other facts legally inferable from what is thus apparent on its face. (p. 729.)

9 That it is a settled principle, that a public grant is to be *taken as evidence* that it issued by lawful authority.

10 That the validity and legality of an act done by a Governor of a province depends on the jurisdiction over the subject matter delegated to him by the sovereign, and the local laws and usages.

11 If any jurisdiction is given, and not limited [and, consequently, as far as not limited,] all acts, done in its exercise, are legal and valid.

All these principles apply to the case under discussion. The grant had efficacy under the law, usages and customs of the territory in which it lies, and by the same test, the land was property at the time the treaty took effect. It is shown by legal evidence and local law to have been severed from the domain. The grant is by the proper officer, professing to act within his powers, and while, on the one hand his powers are not a question competent to be considered much less adjudicated," on the other they are "presumed by law," and are "fully evidenced" by occupation, enjoyment and transfers of property under them, without disturbance by any superior power, and respected by co-ordinate and inferior officers and tribunals. The grant asserts on its face that it is made in pursuance of faculties conferred; it is received in evidence, and is consequently full proof of what it asserts.

The principles of this decision of the Supreme Court have never been overruled or questioned; but have been affirmed and re-affirmed in all subsequent decisions in like cases. Its principles, moreover, have been specially adopted by Congress, and incorporated in the volumes of land laws published by its authority. They are specially made the law for this tribunal; and to my mind they take away all necessity for arguing this objection of the ten leagues; an objection, which appears to me entirely futile and groundless, but which I have felt bound to argue at length, because, from the apparent earnestness with which the objection has been taken, an impression has gone abroad that there is really some foundation for it, and hence it has done, and is doing much mischief, exciting illusory hopes and awakening unnecessary alarms.

Does the guaranty of the 9th article of the treaty apply to California? Where is the property it applies to? where, if not on the sea coast? Where was the population of California when the American occupation took place? If there was any private property in the Department, where was it situated? Did Mexico suppose she was leaving her expatriated citizens in California entirely unprotected? Did she insert the guaranty of the treaty only to protect the Americans and other naturalized citizens on the Sacramento, leaving her own children, the founders of the country, and their descendants, who had borne arms in her service, their ten, fifteen and twenty years, with unratified grants and unguarantied titles, to the tender mercies of a stranger government?

Did Congress suppose this Commission had anything to do? Did they give it a three years existence, with all this preparation and expense, and with appeals to other tribunals, to settle the twenty or thirty titles that may exist beyond tide water?

But let us away with these idle discussions—discussions of questions and points overruled by the Supreme Court long ago. Let us admit (as it is probable we may without any violent depreciation of ourselves,) that the successive Governors of California, who made grants, and successive executives of the Central Government, who knew and acquiesced in the manner of those grants, let us admit that they knew as much of the intent and policy of their laws, and of what was proper under them, as we, strangers to their language, unfamiliar with their legal ideas, and with the facts, circumstances, and previous laws, on which their statutes are founded, can possibly know. Let us admit, that what constitutes a transfer of property from one to another, whether from individual to individual, or from a government to its citizen, is the will to do so; that in these grants, the will of the Mexican nation, the policy of its laws, justice to its citizens, expediency, the purpose she mainly wished to promote, namely, settlement of the country, all combined to vest in the grantees, the ownership—the property—of the land. Let us admit, that when Mexico owed these lands to her citizens for their services; when she desired her citizens to have them, and own them, as a measure of public policy; when she held them for no other purpose than for distribution to her citizens, and invited them to come and reduce them to ownership; that when she wished and intended to bestow them on her citizens, and with that intent gave grants to them, let us admit that she succeeded in her intent; that her citizens did thus acquire rights and property, which she took care to stipulate should be respected and protected.

This is the high, the honorable, the true aspect in which to regard these cases. The claimant here has rights—rights of property. I care not whether his grant ever or not received the approval of the assembly, and that were necessary, or the consent of the Supreme Government, and that were necessary; he was within the policy, intent and direct words of the law, and was entitled to the grant, which he got, and was entitled to whatever approval or consent was necessary to its completion; entitled to it by law and according to the principles of equity, and the usages and customs of the country, and would now be entitled to it, and could claim and receive it, were the other government in existence. But he comes here in a superior condition; he comes here with all terms, qualifications and restrictions of his grant cut off and released and his rights made definitely binding and absolute. Admitting that the former government, in the exercise of an arbitrary discretion, might have refused this approbation of his grant to which the claimant was entitled; the present government reserved no such power; it reserved no discretion in the case; no power over property, whether founded on incipient titles or complete ones; no power of approval or disapproval, refusal or consent; it reserved no power, whatever, over the case; only undertook a solemn duty and obligation.

I am aware that it is said, that the powers and obligations of the government are neither restricted nor increased by the stipulations of the treaty in regard to private property; that the laws of nations would equally have protected it; that it has also been held that our government retained, under treaty stipulations almost in the same words as those in the treaty of peace and limits with Mexico, the same powers over imperfect titles that the former government had or could have exercised.

With all deference, I must say, that should the points directly arise and be discussed, it does appear to me that neither of these positions will be found strictly correct.

On the point first specified, the true doctrine seems to me to be this: that the laws of nations protects private property in conquered or ceded countries; but leaves the rights therein in the same state as the conquest or cession finds them; so that if one happen to be found with an imperfect title, or, to use the words of the Mexican law, with something wanting to its "definitive validity," then the law of nations gives him no remedy, whatever appeal he might have to the justice and magnanimity of his new sovereign. But the treaty does more than this; the treaty undertakes that he shall be *maintained and protected* in his property; not left in a state of uncertainty, much less his undetermined title be determined against him.

On the second point, the true doctrine I believe to be this: that without any treaty stipulation, a province changing sovereigns, comes to the new with all the powers over it that were possessed by the old; hence, whatever discretion remained in the hands of the old government, over incipient grants, would come to and might be exercised by the new. But by the treaty stipulation, this power is foregone; because, it being a well settled principle, that inchoate, even incipient titles, are property, and the treaty undertaking to protect and maintain property, it releases necessarily all rights of forfeiture or voidance, and places all kinds of honest titles on an equal footing—of course making all perfect, since it equalizes by elevating not reducing. This seems to me to be fully recognized in the case of Chouteau's heirs, 9 P. 137.

I take the ground distinctly, then, that our title here stands recognized, confirmed, completed, and forever valid and binding, *ipso facto* by the treaty.

That we had *property* according to the laws of Mexico.

Property according to local usage and custom.

Property according to the contemperous and uniform and concurrent interpretation and construction of the law, running through nearly twenty years, and continually acquiesced in by the federal government.

Property recognized by six successive governments of California; by the public voice; by all inferior authorities; by many declarations and admissions of the government.

Property for which we paid a valuable consideration; the consideration of settlement and occupation—the consideration of military service—all the consideration which the government that gave it, wished or required.

Property fully separated from the public domain, and to reattach which no lawful power exists.

Property in which we are entitled to be maintained and protected, by all the power of the federal government.

Property in which all the presumptions of law argue that there is no imperfection; but in which, if there be defects or imperfections, we have a right to have them cured and a treaty guaranty that they shall be cured.

Property inviolate by the first laws of the social compact, and by the positive enactments of the constitution and the treaty.

In the case of Chouteau's heirs, 9 P. 137, (a Missouri case) the claim was founded on an order of survey and possession, made by the Lieutenant Governor, and concluding as follows: "and afterwards the applicant will have to solicit the formal *title of concession*, of the Intendant General of these provinces, to whom belongs by order of his Majesty, *the disposing and conceding* of every kind of vacant lands of the royal domain." The claim was surveyed about fourteen months after the date of the order, and was accompanied with about three years possession.

The Court held, that this order of the Lieutenant Governor, was a foundation of title, and according to the acts of Congress, and the *general understanding and usage* of Louisiana and Missouri, capable of being perfected into a complete title."

"It is *property*, (say the Court,) capable of being alienated, of being subjected to debts, and is as such to be held sacred and inviolate *as other property*."

The claim was declared valid. Another case of the same parties, 9 P. 147, founded on a like order of survey, made 8 January, 1798, by the Lieutenant Governor, and concluded in like manner, except referring the claimant for his title to the Governor General.

This warrant was plainly in violation of the 9th article of the Regulations of O'Reilly, exceeding largely in quantity the maximum of those Regulations. The Court held that that article was only applicable to a grazing country, and, consequently, that if the regulations had been extended to Upper Louisiana, "*it was* PROBABLE *they were extended with modifications, at least of the* 9*th article.*"

Thus where the Court has been obliged to resort to probabilities, they *invented probabilities* to sustain a good faith claim, and maintain the national obligation. They *invented* probabilities in behalf of justice and honor; for this was not a probability of fact, though it was of law.

In this case the order of survey was not acted on by the claimant till December, 1803, more than five years after its date; but the Court did not allow the objection to prevail. In this case, the Court lays much stress upon the Governor's own representation of his powers, and also upon the fact that, neither the Governor nor Intendant General had ever *refused to perfect* an incomplete title granted by a Governor or sub-delegate; and we ask here like credit to be given to the Governor's declarations of his powers, and to the fact, that, as far as we know, no grant of a California Governor has ever been annulled.

Nearly all the Missouri claims were founded on the same kind of inceptive title, as those already named, provisional on their face, and directing the grantee to apply either to the Governor General, (who was first invested with the granting power) or to the Intendant General, (who succeeded him) at New Orleans, for his title, for the reason that it belonged alone to those officers to concede lands.

These instruments of the Missouri claimants were not grants, and did not profess to be; they were permits at will, and imposed a duty on the party receiving them to apply to the granting officer, before he could receive a concession. Now, even supposing the view urged by the Law Agent in relation to titles here and the character of the approbatory function of the Deputation, to be correct, yet the difference is infinitely in favor of the unconfirmed grants here.

1 The Governor here was the *granting officer*, and made his patent in due form of grant, *dedi et concessi*, which the Lieutenant Governor at St. Louis, was not and did not.

2 The supposed necessary consideration here was the *Governor's* to obtain; there all the subsequent steps were the *donee's*, and his *laches* if they were not performed.

3 In the Missouri cases, if the Governor General or Intendant General should have refused the confirmation, the grant would fall; whereas, in California the authority whose province it was to *complete* the grant, *could not defeat it.*

4 The California patents are *grants*, wherein the granting officer parts with all his discretion in the matter; the Missouri permits were *not* grants; they were only informations or reports to the granting officer in favor of grants.

But in the Missouri cases the Supreme Court wiped away all these objections; and took the high and only true ground, that by the usages and general understanding of the province, those permits being the foundation of a title, and meanwhile standing in lieu of it, were vested rights; were property; and that property inviolate. Not titles, but the foundations of titles; not grants, but the foundation of grants; and that our government could not take away that foundation, but must complete the superstructure.

SATURDAY, June 5th.

During my remarks of yesterday, my attention was called by an honorable member of the Board, to the first section of the Regulations of 1828, and to the fact that in that, there does not appear to be any distinction made between citizens and foreigners, and hence might seem to contradict my argument, that the law of 1824, on which the Regulations are founded, makes such a distinction. I have, therefore, taken occasion to examine the section with care, to ascertain whether in fact, it does operate against the view I had taken of the 4 section of the law of 1824, and I think it assists, rather than hurts my argument.

The construction which I put upon the law is this: that in the States the several Congresses had entire control of colonization, subject to the limitations of the law, in all their domain, except within the ten coast and twenty border leagues; that within those ten and twenty leagues, they and the federal executive together had that control. That in the Territories, the federal executive alone had (under the law,) full control; because, if the 4th section applies to the territories, it still gives the control to the federal executive, and the 16th section confides the whole subject matter, within the territories, to his discretion.

Now in the States, the Congresses alone might provide for colonization in the interior, and on the coasts and frontiers with the consent of the federal executive; consequently, the federal executive alone might colonize all parts of the territories, and that with either foreign or domestic colonization. Hence, the first section of the Regulations of 1828, will admit of either of these views, both of them in harmony with the opinion I have expressed, namely: If the Governor should understand the law as a prohibition against grants to foreigners on the sea coast, then he would suppose his instructions to be in pursuance of the law, and construe them thus: you may make grants both to citizens and to foreigners, that is, to citizens in every part of the territory; to foreigners where by law they may hold, at a distance of ten leagues from the coast; there is land enough for and applicable to both. Or the instructions may be construed thus: the President had full power over the subject of colonization, whether foreign or domestic, and without regard to locality, in the territories, and was willing to delegate the whole discretion which he had over the subject, to the political chief of his appointment, except so far as he reserved it, and hence to say; you may grant lands in all the territory of California, to all persons who under the existing laws may receive grants; you may grant to empresarios, to families, to single persons, Mexicans or foreigners; this is what is confided to me, under the law, and what I confide to you, except as hereinafter reserved.

In my opinion, the latter is the proper interpretation of the law and instructions. That the law gave the President absolute power over colonization in the territories, subject to the general provisions of the law, and that he delegated this power as fully as he received it, with the exception of the reservation in relation to empresario grants or contracts. It will be borne in mind, that only naturalized foreigners could hold land in the Republic, except they came as *colonists*, properly so called, under the lead of an empresario; and hence there would not seem to be any necessity or propriety in making a distinction in the authority conferred on the Governor, between natives and foreigners in regard to private grants; (I use the phrase private grants in contradistinction from empresarios grants); foreigners being understood here as *naturalized* foreigners, since no others could obtain private grants. This will be seen by the 6th section of the naturalization law of March 12th, 1828, which says, that foreigners who establish themselves in the nation, according to the rules prescribed, or to be prescribed for their admission, shall be under the protection of the law, and enjoy the civil rights of Mexicans, with the exception of acquiring rural landed property, which according to the laws in force, those not naturalized cannot obtain.*

I do not think it was individual grants that the government was ever jealous of. I think it was of empresario or colonization grants, properly so called; that it was against these that the 4th section of the law of 1824, was intended to apply. The government could have no occasion to be jealous of grants to individuals; but they might well be jealous of, and wish to guard with extreme care, great empresario grants, covering many millions of acres, (there was one in Texas of forty-five millions of acres,) and intended for the introduction in compact settlements, of thousands of foreign families, more or less clannish, and likely at any time to set up for themselves.

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* The laws in force in 1828, as above shown, were modified by Article 13, of the First Constitutional Law of December 15, 1835, and of December 29, 1836, so that foreigners married to Mexican women, (as well as naturalized foreigners,) might also acquire fixed property. The article is as follows:

Article 13. "The foreigner cannot acquire fixed property in the Republic, if he be not naturalized in it, marry with a Mexican woman, and conform himself to the other requisites prescribed by the law relative to these acquisitions. Neither can they transport to another country their moveable property, except with the requisites and paying the quota which the laws establish. *The acquisitions of colonists shall be subject to the special rules of colonization.*"

Can anything be clearer than the distinction here made between acquisitions in the ordinary course, and acquisitions by colonists and colonization, and that the laws do not intend to confound the two?

I think the whole difficulty in the interpretation of this law, has arisen from a confounding of terms--from mixing and confounding things and words which have no affinity. Laws are always framed with reference to other laws, and to facts, ideas, customs and habits of thought already prevailing; and it cannot be expected that a foreigner can take up a naked statute, and by intuition transport himself into the position of the framer of it, and know every thing on which it was founded, so as to give it at once a correct interpretation. Our own statutes are often difficult to interpret, with all our knowledge of their intended operation, and of the reasons and circumstances of their enanctment, and the simplest of them often admit of diverse constructions. How much more so must be the statutes of a foreign country, in a foreign language, and adapted to a policy and ideas not less foreign to any views we have ever entertained; and when we come with this our limited knowledge of them, to measure rights by them, and to determine the fortunes of individuals, families and communities, how necessary, labor, patience, attention, caution; and how proper to take the largest and most liberal view they will admit of.

It was not necessary to say in the instructions of 1828, to the political chiefs, in authorizing you to make private grants to foreigners, you must understand *naturalized* foreigners; that was already explained in other laws. Yet, if we were for the first time to read those Regulations, and jump hastily to a conclusion, we should say that the section made no distinction.

I think the federal executive had a right, under the law, to grant lands, or cause them to be granted in all the territories, first to native citizens; second, to foreigners; private grants to naturalized foreigners; empresario grants to natives, and to foreigners, whether naturalized or not; that if the 4th section law 1824 applies to the territories, that then he obtained his power over the subject matter, within ten leagues of the sea, from that section, and his power over the remainder from section 16; that if the 4th section does not apply to the territories, that then he obtains full power in the premises from section 16. In either case, and with either interpretation, he has full administration of the law of colonization in the territories. That he delegated that discretion, as fully as he himself received it from the law, whether from the 4th section, or the 16th section, or both, with the single exception of empresario grants to which he reserved, in accordance with the spirit of the law, a special examination and consent. I say in accordance with the spirit of the law; for, though he might under the terms of the law, have delegated fully his control over that as well as other points, yet it was in the spirit of the law, that these grants should only be given under the highest sanction, and he might well think them too weighty and too responsible for final determination by an inferior magistrate. It was one of those precautions, which, under the 8th section of the law of 1824, it was his duty to take for the security of the nation with respect to foreigners who should come to colonize it. And we shall see the propriety of this reservation the more plainly, if we reflect that no certain rules could be laid down to embrace colonization contracts, but that each would have its special circumstances and conditions which the President would naturally desire should pass under his supervision.

It was also suggested in remarks in the course of my argument yesterday, that grants to citizens and foreigners were alike made under the law of 1824, and hence would seem to refute the distinction which I drew between colonization and grants to resident citizens.

Undoubted, the colonization law makes some rules applicable to all subsequent acquisitions from the public domain, and hence in some particulars, it applies to individual as well as to colonization grants. And so, undoubtedly, the Regulations of 1828, do combine in a general order, directions for both species of grants, and would seem, without a careful examination, to confound the two under the general term colonization. But I think a careful examination will show that throughout both the law and the Regulations the discrimination is constantly observed.

The President was to colonize the Territories according to the principles laid down in the law. One of those principles was that Mexicans should be preferred in the distribution of lands. Hence, in adopting general rules, the necessity and propriety of making provision for the observance of that principle; and hence the propriety of saying, in general terms, that grants to individuals as well as colonization grants are made under those laws and rules; though it will be observed that those laws and rules are never referred to as the sole law of the subject.

In the preamble the President says, he dictates these rules in order to give the most *exact fulfilment* to the law—of course the whole law; and hence those provisions which apply to individual grants must, in my opinion, be referred to those sections of the law which are inserted for the protection of the people of the country. The President adopts rules for colonizing the territories, in exact fulfilment of the law. He could not fulfil the law without, at same time, making provision for grants to citizens.

The word *colonize*, in one or another shape, appears in the second, seventh, sixteenth and seventeenth sections of the Regulations of 1828. In each case, it appears to me to apply to colonization, properly so called; while in the seventeenth section the distinction is plainly drawn, rendering it impossible to misunderstand the sense in which, there at least, the word is used.*

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* The following are Spanish definitions of the word colony; the first taken from a late edition of the Dictionary of the Academy, the second from the Dictionary of

I desire to add a few words and quote some other authorities, touching the matter of surveys.

In the case of Richards, 8 P. 470, the grant was confirmed notwithstanding an erroneous survey.

In the case of Antonio Huertas, 8 P. 475, the grant was confirmed, though the survey was not executed till September, 1818. The Court received proof of the identity of the survey with the boundaries described in the grant.

In the case of Gomez, 8 P. 477, the grant was confirmed according to the boundaries.

In the case of Fleming's heirs, 8 P. 478, a grant of twenty thousand acres was confirmed, "to the extent and according to the boundaries set forth in the grant." No survey.

In Levi's case, 8 P. 479, grant of sixty-five thousand acres, in different parcels, confirmed; all the surveys were executed after the treaty and one of them was sent back by the Court for a re-survey.

In the case of Hernandez, 8 P. 485, the definitive title was not issued till April, 1821, nor any surveys executed. The claim was affirmed.

In the case of Huertas, 8 P. 488, the claim was affirmed, but sent back for a corrected survey.

In none of these cases, nor in any others, was any notice taken by the Court of the survey, except to identify the land, and where it did not conform to the grant, a re-survey was ordered.

In Smith's case, 10 P. 332, the Court held, that "Spain did not allow her lands to be severed by a private act, but always by a public officer." Yet in the same case they declare that they have frequently affirmed the validity of descriptive grants, though not surveyed under the government which made the grant.

Now the Mexican law, on the other hand, contemplates the selection and designation of the land by the grantee, and its delineation by means of a map, for the purpose of the grant, and does not contemplate its severance by a public surveyor.

Finally, on this point, there is no case in Louisiana, Missouri, or Florida, where the Supreme Court have set aside a claim for want

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Jurisprudence and Laws of Escriche, Madrid, 1846; the third from a Mexican edition of the work of Escriche, with notes of a Mexican licenciate, prepared long since the colonization laws and rules existed, and may be supposed, I think, to furnish the Mexican legal definition of the word:

Colonia. s. f. Cierta porcion de gente que se envia de òrden de algun príncipe ó república á establecerse en otro pais, y tambien el sitio ó lugar donde se establecen. Latin, *Colonia.*

Colonia. Cierta porcion de gente que se envia de òrden de algun príncipe ó republica á establecerse en otro pais, ó la reunion de gente que sale de un pais para poblar otro; y tambien el sitio ó lugar donde se establecen.

Colonia. Cierta porcion de gente que se envia de órden de algun príncipe ó republica á establecerse en otro paise; y tambien el sitio ó lugar donde se establecen.

of a survey, or on account of an erroneous survey, prior to the cession. They have uniformly held, that a specific grant, or a grant by reference to something that can be made certain, has equal merit with one whose area has been ascertained by survey.

I desire also to add a few words, and authorities, in regard to what Courts will *presume* in support of undisputed occupations, and the powers of officers who assume to grant.

In the case of Pickering *v.* Lord Stanford, in Vesey jr. 583, the High Court of Chancery held that "every presumption that can fairly be made shall be made against a stale demand." "At law, in suits where the title can be made good only by matter of record, as letters patent, or even where a private act of Parliament was necessary, the presumption holds, though neither of those instruments, which ought to be of record, can be found."

Now the records of the Privy Seal, where the records of the King's patents ought to be found, and the rolls of Parliament, where the private acts of Parliament ought to be found, cannot be less complete, or less easy of search, than the old archives of the Territorial Deputation and Departmental Assembly of California; kept in the first instance in loose sheets, or unbound blotters; exposed in twelve years to half a dozen civil revolutions; shipped from Monterey to Los Angeles, from Los Angeles to Monterey; thence to Sonora; thence to Benicia; and finally to San Francisco; and during nearly all the intervals of these migrations, open to whoever chose, and liable to depredation, destruction and loss. To presume a patent from the British Crown, or an act of Parliament, where no record of them can be found, is a violent presumption; a presumption of law, to maintain the equity of ancient appropriation; not a presumption of fact, nor hardly warranted in fact. To presume a private act of the Deputation or Assembly of California, or of one of its Governor's, is not a violent but a natural presumption, and especially in a case like this, where we know the proceeding was begun, and required but a single step to complete it; and where the books in which it ought to be recorded, are not to be found.

In the case of Bealey *v.* Shaw, 6 East 215, Lord Ellenborough, says: twenty years exclusive enjoyment (of water) affords a *conclusive presumption* of a right derived from grant or act of Parliament; and "less than twenty years may or may not according to circumstances." And the Supreme Court have held (Ricard *v.* Williams, 7 Wh. 59, and in other cases) that presumptions of this class apply to corporeal as well as to incorporeal hereditaments.

True, we do not come in this case, with the twenty years occupation which, according to Lord Ellenborough, would afford a "conclusive presumption"; but that rule is only where the case stands on presumption alone, and even then a shorter time will have the same effect, if other circumstances (as in this case all circumstances do,) conduce. The rule holds in all cases where the occupation may have had a legal beginning: how much more where we have shown that it had, in fact, a legal beginning, and was in all particulars conformable to the laws and policy of the country.

In the case of the United States *v.* Clarke, 8 P. 462, the Supreme Court *presume* the rightfulness and binding force of grants of the kind under their consideration, from the power of making them having been exercised *since the year* 1813; and that the King (supposed to be informed of the acts of his officers) had not disapproved of it. The presumption there rested therefore on a practice of five or six years, since it dates only from 1813, and the treaty was formed in February, 1819. Here, we claim under a practice reaching back to the year 1773, since which time the Governors of California have made such grants, with the knowledge and assent of those above them, and respected by those beneath: from 1773 to 1846—forty years under the Spanish Government, twenty-three years under the Mexican. Leaving out, however, all the time prior to the introduction of the law of 1824, as carried into effect by the Regulation of 1828, we have still a period of eighteen years; or dating from the year 1833, when the administration of Governor Figueroa commenced, we have a period of thirteen years of uninterrupted exercise of this power, by seven successive Governors of California, with the full knowledge of the Supreme Government, and without a syllable of disapprobation.

In the case last quoted, (Clarke's case, 8 Peters,) the grant recited a particular royal order as the authority on which it was made, and which order it was admitted *did not authorize* the grant. The Court held that the recital of the order was an immaterial allegation, and did not affect the instrument; that it "would be *presumed* that the Governor had acted within the limits of his authority, though that authority was not shown." The same doctrine is held in a multitude of other cases; and in Strother *v.* Lucas. 12 P. 438, is declared to be "too deeply founded in law and reason ever to be successfully assailed."

But, apart from all these presumptions of law, the principles of which, applied to the circumstances of this case, appear to me to be conclusive, I hold that the claim before the Board has been absolutely and unconditionally ratified and confirmed by the Mexican Government, in a decree of its authorized agent, Governor Micheltorena. This decree, which was a public act, was issued on the 29th March, 1843. It exists in the archives in Mss., and is published, with the exception of the preamble, in the Senate editions of the several reports that have been made to the Government on Land Titles in this State. The preamble to this decree (from which extracts, together with the instructions on which it is founded, are given in the Appendix,) asserts that it is made in pursuance of ample faculties given by the Supreme Government. It relates especially to the lands which had been granted subsequent to the secularization laws of Mexico, out of the tracts previously occupied by the Missions, and declares in regard to such grants that "policy renders irrevocable what has been already done;" and concludes with an assurance of protection to the Missions, and to private property, "securing to the owners the possession and preservation of the property they now hold," but stipulating not to make any new grants (of Mission lands) "without consultation with the priests," etc.

Micheltorena came into California on a mission of peace. After the revolution of 1836, and the subsequent erection of California into a "free and independent State," though this independent position was not long maintained, little more than a nominal reconciliation took place; and the war with Texas, the civil commotions, and frequent successions of revolutionary governments in Mexico, prevented the Central Government from giving proper attention to this remote Territory. When the prevailing contests in Mexico were cut short by the plan of Tacubaya, and the election of Santa Anna as Dictator, an era of "political regeneration" was announced, and Santa Anna, in pursuance of the extraordinary faculties given by the 7th article of said Plan,* hastened to consolidate his powers by the despatch into the different departments,† of trusty agents attached to his cause, with the amplest faculties to redress grievances and remove subjects of complaint. In pursuance of this policy, Governor Micheltorena was sent to the department of the Californias, to represent the powers of the Federal Executive, who represented and wielded the powers of the nation. He was sent to fulfil the neglected duties of the Supreme Government; to restore quiet; to conciliate the inhabitants; to develope the resources of the country; to hasten its settlement, and improve its commerce. All these are prescribed in the general instructions given him, with ample powers to carry them out. These instructions not having been heretofore printed, as far as I am aware, I have inserted them, together with a translation, (both copies official) in an appendix hereto. It will be perceived that they are written in the most conciliatory spirit, and an earnest desire shown in them to have every cause of anxiety or complaint existing in California toward the Supreme Government, removed or rectified, and all public interests and desires attended to. It was pursuant to these instructions, and under the complete power which they conferred, that the decree of

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*The Bases of Government established at Tacubaya, 28 September, 1841, by a reunion of the military under Santa Anna, and ratified 6 October, 1841, by a convention between the contending parties under Bustamente and Santa Anna respectively, are contained in the first volume of the *Observador Judicial*, page 7. The 7th article is as follows:

"Las facultades del ejecutivo provisional son todas las necesarias para la organizacion de todos los ramos de la administracion publica." (The powers of the provisional executive are all those necessary for the organization of all branches of the public administration.)

†The Mexican federation was broken up in the year 1835, and the States reduced and territories created, into "Departments." The federative system (with the constitution of 1824,) was restored in 1846–7.

Micheltorena (as we are informed in its preamble) was made. The decree, though intended mainly for those cases where lands formerly pertinent to the Missions had been granted subsequent to the secularization laws, is yet general in its character, and may well be construed to a general intent. But, in the present case, we come directly within its provisions. The grant of Cruz Cervantes was one of those covered by its immediate intent. It had been pertinent to a Mission; under the secularization laws it had been granted; and whatever asssent or approval it needed to its completion, it now received from the highest granting power, and was thus made "irrevocable."

Our attention cannot fail to be struck by the fact, that neither in the instructions to Micheltorena, enumerating the grievances he is to correct, and the means of conciliation he is to employ, though it is evident they intended to cover every disquieting cause in the department; nor in the decree of Micheltorena, intended for the resolution of disturbing questions, and the quieting of private rights, is a word said of the question of the "ten leagues."

Does not this fact put the matter at rest, as far as any acts of those high functionaries can give an authoritative interpretation to to the law? Do not these instruments, at all events, convey the federal approbation and consent, as fully as any interpretation of the law can require, to rights of property up to that time acquired?

I ask attention to this decree of Micheltorenna; and I claim it to be an absolute confirmation, with the approval of the Federal Executive, of the claim before the Board.

I stated yesterday that I take the ground, that our title, even if imperfect, and even if subject to be vacated and resumed by the former government, stands confirmed and absolute *ipso facto* by the treaty.

In the case of Simms *v.* Irvine, 3 Dallas 425, Douglass acquired a right under the British government to five thousand acres of land for services in the French war. He assigned to Simms, who afterwards obtained a warrant from the State of Virginia, and located it on Montour's island, in the Ohio river. In determining the boundaries between the States of Virginia and Pennsylvania, this island went to Pennsylvania. Under Pennsylvania Simms obtained a survey according to his warrant, but did not obtain a patent. Irvine claimed under a statute of Pennsylvania, authorizing him to make a pre-emption on the island, and proceedings under it. The Court held (opinion by Chief Justice Ellsworth) that Simms by his warrant from Virginia and location of it on the island, acquired a complete equitable title, and needed only a patent for a complete legal title; that a *confirmation* of this equitable title, AS COMPLETE AS A PATENT COULD HAVE BEEN, was conferred in the compact between Virginia and Pennsylvania, "reserving and confirming" rights previously acquired under Virginia; that the terms of the compact must be expounded favorably for those rights, so that titles before substantially good, should not, after a change of jurisdiction, be defeated or questioned for formal defects.

The terms of the compact between Virginia and Pennsylvania were not nearly so conclusive as the guaranty of the ninth article of our treaty with Mexico. "Reserving and confirming" rights might very well be construed to mean reserving and confirming them in the state in which they were found; but the stipulation to "*maintain and protect property*" is much more comprehensive, and imposes much larger obligations.

In the case of Fairfax *v.* Hunter, 7 Cranch 703, Denny Fairfax, an alien enemy was devisee of Lord Fairfax of the property called the Northern Neck of Virginia; and in the year 1789 the State of Virginia patented a portion of the lands to Thomas Hunter. The suit was brought to eject Hunter.

The Court held that though Denny Fairfax could not have taken the land by descent, i. e. by operation of law, he took it properly by devise, i. e. by act of the party; but that he took it not for his own benefit, but for the benefit of the State; that from the time of the death of Lord Fairfax in 1781, down to the treaty of 1794, the State had, consequently, a right of entry into the lands, and by proper proceeding by inquest of office, to consummate their title. But that having omitted this proceeding, whether by mistake or design, prior to the treaty of 1794, the right of the State was cut off by the treaty; that the possession and seisin of the plaintiff continued up to and after the treaty of 1794, "*which* (i. e. the treaty) being the supreme law *confirmed this title to him.*"

The clause of the treaty of 1794, (article 9) quoted in this case, is, that "it is agreed that British subjects who now hold lands in the Territories of the United States, and American citizens who now hold lands in the dominions of his majesty, shall continue to hold them *according to the nature and tenure of their respective estates*;" language that might without violence have been interpreted that Denny Fairfax having, before the treaty, held this estate in trust for the Commonwealth, and liable to entry by an inquest of office, continued so to hold it. But the Court took cognizance of the treaty, according to its intent, and held that *it* confirmed the title of Fairfax, and cut off the right of forfeiture in the State.

So we contend, under the far more comprehensive and obligatory terms of the treaty with Mexico, that by the treaty our title here is confirmed, and whatever right of forfeiture or avoidance may have been in the State before the treaty, has (in the language of the Court) "*by the operation of the treaty*, become ineffectual and void."

In the case of Marlett *v.* Silk, 11 P. 20, again, plaintiff claimed under a right derived from the State of Virginia; defendant under a title from the State of Pennsylvania. Plaintiff entered on the land (in Western Virginia) in 1772, contrary to law, and consequently as a trespasser; but in 1779, the Legislature of Virginia recognized settlement rights in the plaintiff and others in like circumstances, and authorized them to enter a certain number of acres each. The defendant claimed under a warrant from Pennsylvania, taken out in 1773, and surveyed in 1778. Afterward by the settlement of limits between the two States, the land came under the jurisdiction of Pennsylvania, and, by the compact, rights acquired under the States respectively, were to be respected by the other according to priority. The Court held, that the case was, so to speak, an international one, between two States, and the *rule of decision to be the compact;* that Virginia by the act of 1779, had recognized the right of plaintiff as beginning in 1772, when he made his settlement; that that right, however inchoate and shallow, was protected by the compact; and the case was so decided.

The 11th section of the act creating this Board, prescribes as rules of decision for the Board, the treaty, the laws of nations, the laws, usages and customs of the country, the principles of equity, and the decisions of the Supreme Court.

The treaty is first and supreme; and the others, as it seems to me, can only be considered as prescribed in subordination to that higher law, and to be invoked only where they come in aid of it. The inferior cannot override the superior: no law or rule of decision can override the treaty: and we appeal to the treaty, which guaranties the protection of our property, as the "*rule of decision;*" by the "operation of which" all rights of forfeiture (if any before existed) are "rendered ineffectual and void;" and our title "confirmed, as effectually as any patent could do it."

APPENDIX.

MEXICAN EXECUTIVE REGULATIONS OF 1828.

Disposiciones Generales, ò Reglamento para la Colonizacion de los Territotios de la Republica.

Estando prevenido en el articulo 16 de la ley general de Colonizacion de 18 Agosto de 1824, que el gobiernio, conforme á los principios establecidos en dicha ley, procederá á la colonizacion de los territorios de la Republica; y siendo muy oportuno para darse á dicho articulo el mas puntual y exacto cumplimiento, dictar algunos disposiciones generales que faciliten su ejecucion en los casos que vayan ocuriendo, el E. S. Presidente ha tenido á bien acordar los articulos que sigüen:

1o. Se autoriza à los gefes politicos de los territorios para que con arreglo á la ley del Congreso general de 18 de Agosto de 1824, y bajo las calidades que despues se espresan, puedan conceder terrenos valdios de sus respectivos territorios á los empresarios, familias, ò personas particulares Mejicanas ó estrangeras que lo soliciten con el objeto de cultivarlos ò habitarlos.

2o. Todo pretendiente de terrenos, sea empresario, cabeza de familia ò persona particular, se presentará al gefe politico del respectivo territorio por instancia en que se esprese su nombre, patria, profesion; el numero, naturaleza, religion, y demas circunstancias de las familias ò personas con que quiere colonisar, marcando asi mismo con la distincion posible, y discribiendo en un diseño el terreno que solicita.

3o. El gefe politico procederá desde luego à tomar el informe que sea bastante, sobre sí se encuentran ó no en la solicitud las calidades que requiere la citada ley de 18 de Agosto, así en el terreno, como en el pretendiente, ya para que se atienda *á* este sencillamente, ya para que [sì ?] se le prefiera oyendo al mismo tiempo á la autoridad municipal respectiva sobre sí halla ó no algun reparo en la concesion.*

General Provisions, or Regulation for the Colonization of the Territories of the Republic.

It being provided in the 16th article of the general law of colonization of the 18th August, 1824, that the Government, conformably to the principles established in said law, shall proceed to the colonization of the Territories of the Republic; and it being fit, in order to give to said article the completest and exactest fulfilment, to prescribe some general provisions to facilitate its execution in the cases that may be occuring, his excellency the President has seen proper to appoint the following articles:

1. The political chiefs of the Territories are authorized, in conformity with the act of the General Congress of 18th August, 1824, and under the conditions hereinafter expressed, to concede vacant lands of their respective Territories, to empresarios, families, or individuals, Mexicans or foreigners, who petition for them with the object of cultivating them or living on them.

2. Every petitioner for lands, whether empresario, head of a family, or individual, shall present himself to the political chief of the respective Territory, by petition, setting forth his name, country, profession, the number, description, religion, and other particulars of the families or persons with which he wishes to colonize, defining also, as distinctly as possible, and describing in a map, the tract which he solicits.

3. The political chief shall then proceed to take the information that may be necessary, whether or not the petition comprehends the qualities required by the said law of 18th August, as well in regard to the tract as to the petitioner, so that the case may be considered either simply on the petition, or if it be preferred, consulting at the same time the proper municipal authority, whether or no there be found any hindrance to the grant.

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* The construction of the latter branch of this section is not clear. After consulting with several Spanish and English scholars, I have adopted the interpretation here given, which agrees likewise with the official translation of Mr. Hartnell.

4o. En vista de todo, el gefe politico accederá ó no á dicha solicitud, arreglandose esactamente á las leyes aplicables á la materia, con especialidad á la ya citada de 18 de Agosto de 1824.

5o. Las concesiones hechas á personas ó familias particulares no se tendrán por valederas definativamente, sin previo consentimiento de la Diputacion Territorial, á cuyo efecto se pasarán à esta los espedientes respectivos.

6o. Cuando el gefe politico no obtuviere la aprobacion de la Diputacion Territorial, dará cuenta ál Supremo Gobierno con el espediente de la materia, para su resolucion.

7o. Las concesiones hechas á empresarios para que colonizen con muchas familias no se tendrán por valederas definitivamente hasta no obtener la aprobacion del Supremo Gobierno, á quien se dará cuenta con el espediente, agregandose á este el informe que paresca á la Diputacion Territorial.

8o. Hecha definativamente la concesion que se solicita se espederá un documento firmado por el gefe politico que sirva de titulo al interesado, espresandose en este que la concesion se entiende con entera conformidad á lo dispuesto por las leyes, en cuya virtud se procederá á la posecion.

9o. De todas las solicitudes que se presentan y concesiones que se hagan, quedarán los correspondientes asientos en un libro destinado al efecto, con los diseños de los terrenos que se concedieren, y se pasará al Supremo Gobierno cada trimestre una nota circunstanciada.

10o. No se podrá admitir capitulacion alguna para nueva poblacion, si no es que el capitulante se obligue á presentar en calidad de pobladores á lo menos doce familias.

11o. El gefe politico señalará al nuevo poblador un tiempo proporcionado, dentro del cual precisamente deberá cultivar ú ocupar el terreno en los terminos, y con el numero de personas ó familias que haya capitulado, en el concepto de que no haciendolo, quederá nula la concesion del terreno, pudiendo sin embargo el gefe politico revalidarla en proporcion á la parte en que hubiese cumplido el interesado.

12o. Todo nuevo poblador, despues que haya cultivado ú ocupado el terreno con arreglo á su capitulacion, cuidará de justificarlo ante la autoridad municipal, para

4. In view of the whole, the political chief shall accede or not to the said petition, conforming himself exactly to the laws applicable to the matter, especially to that before cited, of 18th August, 1824.

5. Concessions made to individuals or families, shall not be held definitively binding without the previous consent of the territorial deputation, to which effect shall be transmitted thereto the relative records.

6. When the political chief shall not obtain the approbation of the territorial deputation, he shall report to the supreme government, with the records of the case, for its resolution.

7. Concessions made to empresarios to colonize with several families, shall not be held definitively binding until shall be obtained the approbation of the supreme government, to whom report shall be made, with the record of the case, adding to it the report which may appear fit to the territorial deputation.

8. The concession asked for, being definitively made, a document shall be issued, signed by the political chief, which may serve as title to the interested party, expressing therein that the concession is to be understood in entire conformity to the dispositions of the laws, in virtue of which the possession shall be proceeded to.

9. Of all the petitions that may be presented and concessions that may be made, there shall be kept corresponding entries in a book prepared to that end, with the maps of the tracts which are conceded, and there shall be sent to the supreme government each three months, a circumstantial account.

10. There shall not be admitted any contract for a new settlement, unless the contractor obligate himself to present in the character of settlers, at least twelve families.

11. The political chief shall appoint to the new settler, [or, more properly, founder of a new settlement,] a suitable time within which he shall necessarily cultivate or occupy the land under the conditions, and with the number of persons or families that he may have stipulated, with the understanding that if he shall not perform it, the grant of the land shall be null, being able, nevertheless the political chief to revalidate it in proportion to the part that the interested party should have fulfilled it.

12. Every new settler, after he shall have cultivated or occupied the land, according to his contract, shall take care to prove it before the municipal authority,

que haciendose el asiento oportuno, consolide y aseguere su derecho de propriedad, para poder disponer libremente de ella.

13o. La reunion de muchas familias en una poblacion, seguirá en su formacion, gobierno y policia interior las reglas establecidas por las leyes vigentes para las demas poblaciones de la republica, teniendose especial cuidado en las neuvas, de que se construyan con la posible regularidad.

14o. El *minimum* de terreno de regadio que se dé para colonizarse por una mano será de doscientos varas en cuadro; el *minimum* del de temporal será de ocho cientos varas. El *minimum* del de abrevedero será de mil doscientos varas.

15o. El terreno que se dé para un solar ser de cien varas.

16o. Los huecos que quederán entre los terrenos colonizados podrán distribuirse entre los poseedores limitofres que hayan cultivado con aplicacion los suyos, y no hayan recibido todo la estencion de terreno que la ley permite, ó á los hijos de los mismos poseedores que los soliciten para concretar las propriedades de sus familias, teniendose para esto muy presente la moralidad é industria de los intersados.

17o. En los territorios en que haya misiones, los terrenos que estas ocupen, no podrán colonizarse por ahora y hasta que se resuelva si deben considerarse como propriedad de las reducciones de los neofitos catecumenos y pobladores Mejicanos.

Mexico, 21 de Noviembre de 1828.

in order that, the proper entry being made, he may consolidate and secure his right of property, so as to be able to dispose freely of it.

13. The reunion of a number of families in one settlement shall follow in its formation, government and internal police, the rules established by the existing laws for the other settlements of the Republic, having special care in the new ones that they be built with all possible regularity.

14. The minimum of irrigable land that shall be given for colonization for each person, shall be two hundred varas square; the minimum of that which is not irrigable shall be eight hundred varas; the minimum of that for pasturing cattle [or having watering places for cattle,] shall be one thousand two hundred varas.

15. The tract given for a building lot shall be of one hundred varas.

16. The spaces which remain between the colonized tracts may be distributed among the adjoining possessors who shall cultivate their own with assiduity, and shall not have received the whole extent of land that the law allows, or to the children of the said possessors who may solicit them, to combine the possessions of their families, having regard for this object to the morals and industry of the interested parties.

17. In those territories where there are missions, the lands which those occupy shall not be colonized at present, and until it shall be determined if they ought to be considered as property of the settlements of neophyte-catechumens [*i. e.* converted Indians—neophytes, or pupils of the missions,] and Mexican settlers [or citizens.]

Mexico, 21st Nov. 1828.

INSTRUCTIONS AND POWERS OF MICHELTORENA.

INSTRUCTIONS.*

Con fecha 11 de Febrero de 1842, me dice el E. S. Ministro de la Guerra y Marina lo que copio: E. S. Deseando el E. S. Presidente provicional de que en el Departamento de Californias se promuevan todos los recursos que tiene para prosperar

TRANSLATION.†

Under date of the 11th February, 1842, the Minister of War says what follows.

Most Excellent Sir: His Excellency the President *ad interim*, being desirous that the Department of California should y ponerse en defenza y en el estado de felicidad al que aun la misma naturaleza le invita; teniendo en consideration los sucesos que ha habido en el pais y que por la distancia no ha podido evitarlos el Gobierno Nacional; la situacion en que V. E. va á encontrarse y las medidas que tendrá que adoptar, cuyas consultas no surtirán efecto, sí aguardan el tiempo necesario para su resolucion; que hay asuntos en los que el mas pequeño retardo no proporciona el remedio; y confiado en que V. E. no absuará del poder y que el que se le concede lo empleará en bien del servicio y de todos los habitantes del interesante y feraz Departamento que el Gobierno Supremo ha puesto á su cargo y responsabilidad, se ha servido conceder á V. E. ademas de las atribuciones que le demarcan las leyes y ordenanzas vigentes, como Gobernador, Comandante general é Inspector, todas las facultades que puede delegarle el Gobierno Supremo para que en uso de ellas, remueva á los empleados civiles y militares dependientes de él, que no correspondan á sus deberes y á la confianza del mismo Supremo Gobierno, reemplazandolos con ciudadanos dignos que entrarán al ejercicio de sus destinos, sin perjuicio de que V. E. dará cuenta para la aprobacion suprema con las causas de sus procedimientos. Las miras del Supremo Magistrado no solo se reducen á la Alta California, sino que tambien se estienden á la Baja, en cuya demarcacion han aparecedo conatos de eccision que fomentados por enemigos ocultos, han hecho que tomen parte algunos estraños, que su mismo origen les prohíbe el ingerirse en querellas domesticas; y como este resuelto á proteger á las tropas, autoridades y vecinos de la mencionada peninsula, ha resuelto, que el mando militar de V. E. se estienda á dicha Baja California como está en lo politico; separando lo de él de Sinaloa, sin embargo de que el Señor Commandante General de los Departamentos de Sonora y Sinaloa, continuará impartiendo á V. E. los recursos y aucilios de que hubiere menester por asegurar la paz, para socorrer las tropas, para proveer al vecindario y por hacer que toda la demarcacion prospere y sea feliz. Aunque el art. 1, de 2 de Noviembre, de 1839, derogó los articulos del de 18 de Febrero de mismo año que sugetaban á la dependencia de la Plana Mayor del Ejercito, y el 13 del primer decreto citado solo se deja á los Commandantes Generales de los Departamentos de Oriente y Occidente con las antiguas atribuciones inspectoras que tenian en las companias precidiales, el E. S. Presidente

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* I have received this copy through the courtesy of Capt. Halleck. It is taken from a copy communicated by Micheltorena to Don Pablo de la Guerra, then Administrator of Customs at Monterey.

† This translation was made by Mr. Hartnell, as I suppose, when he was government translator, in charge of the Archives. I copied it, by permission, from a document in the Archives, in February, 1851, when they were in charge of Major Canby, at Benicia.

take advantage of all the resources which it possesses for its prosperity, for placing itself in a state of defence, and for acquiring that happiness which nature itself invites her to take possession of; and bearing in mind the disturbances which have taken place in the country, and which, on account of the distance, the National Government has not been able to avoid; the situation in which Y. E. will be placed and the measures which you will have to adopt, and which will produce the desired effect if you wait for the proper time to put them into execution, for there are matters which do not admit of the least delay, and in the persuasion that Y. E. will not abuse your powers but that you will exercise them for the welfare and service of all the inhabitants of that interesting and fertile Department which the Supreme Government has placed under your charge and responsibility, he (the President) has been pleased to grant to Y. E. over and above the attributions assigned to you by the existing laws and regulations, as Governor, Commandant General and Inspector, all the powers which the Supreme Government can confer upon you, in order that by virtue thereof you may remove from office all such civil and military officers dependent on said Government who shall not fulfil their duties or act up to the confidence reposed in them by the same, and fill their situations by appointing worthy citizens who shall take their places and enter upon their duties, but with the understanding nevertheless that you report to Government the motives of your proceedings for its approbation. The views of the Supreme Magistrate do not only refer to Upper California, but extend likewise to Lower California, where certain seditious movements have appeared, which being fomented by hidden enemies, it has caused some foreigners to take part when their very quality of foreigners prohibits them from intermeddling in domestic strife; and as the President is resolved to protect the troops, authorities, and citizens of said Peninsula, he has determined that your military command shall likewise extend to Lower California as well as the civil command, separating it from Sinaloa, and the Commandant General of the Department of Sonora and Sinaloa will continue to furnish you with the resources and assistance which you may require for the purpose of securing peace, furnishing the troops, providing for the wants of the citizens and enabling you to provide for the prosperity and happiness of the whole Department. Although the 1st article

referido ha resuelto, que las facultades de V. E. se estiendan como inspector al Batallon fijo de Californias y que en todo lo relativo obre en mecanica y se entienda con la Plana Mayor del Ejercito. Va V. E. á esperimentar el arreglo ó desorden en que se encuentran las aduanas maritimas de Ambas Californias: tiene la necesidad de ecsaminar la situacion que guardan todas las misiones en su gobierno, adelantos y ramo de contabilidad; tiene que proceder á la inspeccion y reorganisacion de las compañias presidiales, y para toda debiera dejar ecsistente el mal mientras que se resolvia la consulta. El Gobierno Supremo confiando en la justificacion y actividad de V. E. quiere desde luego que el daño se evite, que el bien se establesca, y que desde luego ningun obstaculo lo impida, y por lo mismo, las facultades que delega en V. E. las hace estensivas á estos ramos y á cuantos mas puedan contribuir á la dicha del paiz contando entre sus ramos la administration de correos, la colonisacion, el establecimiento de Presidios, la mejora de los puertos, la seguridad de los Pueblos, la civilisacion de los salvages, la educacion de la juventeed, la apertura de caminos, el fomento de las artes, la proteccion de la agricultura y el comercio, el establecimiento de casas de correccion y el hornato de las poblaciones. Conoce V. E. las miras del Gobierno Supremo; sabe muy bien que amigo del progresso solo anhela por la union entre los Megicanos, y por que todos los pueblos disfruten el amparo de las leyes y una libertad tan estensa que solo la limite el acatamiento á las leyes, la obediencia á sus autoridades, y el deber que tenemos para procurar el bien y evitar á todos se les haga perjuicio. En esta virtud no me detengo en recomendarle propague estos principios y unicamente le advierto que al dictar sus instrucciones el Supremo Magistrado ha querido manifestar á V. E. su aprecio y la entidad del gobierno que le confia y a los habitantes de Californias el acreditarles que la presente administracion desea su dicha, desconoce la apatia, y està pronta á impartir en favor de aquel Departamiento todos cuantos recursos apetesca y pueda proporcionarle. Los dignos militares que marchan á las ordenes de V. E. van *á* prestar un servicio en favor del territorio nacional digno sin duda de la gratitud publica; los habitantes de aquel Departamiento van á esperimentar en ellos un modelo de honrades, de subordinacion y disciplina, y para que se acrediten estas honorificas calidades es indispensa-

of the law of 2d November, 1839, derogated the articles of that of the 18th February of the same year which subjected the subordination of the staff of the army, and the 13th article of the first mentioned decree merely leaves the Commandant General of the East and West with the former attributions of Inspector which they possessed in the Companies of Presidios, His Excellency the President has determined that your powers shall extend as Inspector to the permanent Batalion of California and that you take charge of all the mechanism thereof and report to the staff of the army. You will become acquainted with the good or bad management of the Maritime Custom Houses of both Californias; you will have to examine the situation of all the Missions with respect to their management, improvement and state of accounts; you will have to proceed to the inspection and reorganization of the Companies of Presidios, and in all cases (were you not to act) the evil would have to remain until Government could resolve. The Supreme Government trusting in your justice and activity, desires that you should meet with no obstacles, and therefore the powers conferred upon you are made extensive to those branches and to all others which may conduce to the welfare of the country, including amongst others, the administration of the Post Office Department, Colonization, the establishment of Presidios, the improvement of Ports, the safety of Towns, the civilization of wild Indians, the education of youth, the opening of roads, the furtherance of the arts, the protection of agriculture and commerce, the establishment of houses of correction, and the establishment of towns.

You know the views of the Supreme Government, and are well aware that being a friend to improvement it merely desires the union of Mexicans, and that the community in general may enjoy the protection of the laws, be obedient to their authorities, understand that it is our duty to procure the welfare of every one and avoid that all others be injured. I therefore will not detain myself by recommending you to propagate these principles, and will merely mention that when the Supreme Magistrate dictated his instructions, he wished to manifest to you his esteem, and the importance of the command he has confided to you, and to assure the inhabitants of California that the present administration desires their happiness, disavows all apathy, and is ready to impart to that Department all

ble que V. E. les recuerde continuamente que su residencia no va *á* ser en unos pueblos que si bien carecen sus habitantes de la civilisacion de cortesanos, tambien es verdad que son dociles, hospitalarios, amigos del bien, y susceptibles de aprovechamiento y libres de ese contagio que tambien perjudica en las grandes poblaciones en donde corrompide la moral, solo se enseña á criticar acciones inocentes que debieran servir de buen ejemplo."

Lo que trascribo *á* V. para su inteligencia y fines consigiuentes.

Dios y Libertad.

Enero, 10, de 1843.

MANUEL MICHELTORENA.

Sor Admor. de la Aduana Maritima dc Monterey.

the resources which it may desire and be able to furnish it.

I communicate this to Y. E. for your satisfaction. God and Liberty. Mexico, 11 February 1842.=Tornel.=To General Don Manuel Micheltorena.

I certify that the foregoing copy is the same as the one that was copied from the original when I was in charge of the Governor's Secretaryship.

Monterey, July 6, 1850.

(Signed) MANL. JIMENO.

Extracts from the Decree of Micheltorena, 29 March, 1843.*

One of the ample instructions with which the undersigned, General and Governor, finds himself invested, being that of examining the positions the Missions maintain, in their administration, improvements and liabilities, and to regulate the same ; and the National Supreme Government having invested him with all its powers, as shown in the supreme order of 11 February, 1842 ; in accord and with consent of the most Reverend Father Friar José Joaquin Jimeno, Friar José de Ma. de Jesus Gonzales Rubio, whom to that end I caused to be called before this government, as well as the Presidents of the other Missions, and in the name and representation of the most Reverend Father President Vicar Foraneo Friar Narciso Duran ; being informed of all that was necessary ; and considering that the vast and immense lands formerly property of the Missions have been distributed to private individuals, at a time when it was made one of the exigencies of the country ; that those pious and beneficial establishments are reduced nearly to the gardens and grounds of their temples and edifices ; that the most Reverend F. Ministers have no means of subsistence except mercenary, and that the divine worship, without prospering, is scarcely maintained ; that the Indians by their natural reluctance to labor, suffer from scantiof food, and nakedness—those not in private employment, or subjection, preferring to flee away and die impenitent in the woody deserts, dragging out a life of slavery, full of privations, and without any of the social enjoyments ; that the continual emigration of natives from private individuals to the Missions, and from the Missions to private individuals, and to the wilderness, more and more hinders agriculture, and instead of attracting the heathen, drives them away from the bosom of our Holy Religion ; that in the administration of the Missions some frauds and notorious abuses have been committed, which all the inhabitants of the country lament ; and that there are no other means to reanimate the skeleton of a giant, which the remains of the ancient Missions are, than to have recourse to experience and to sustain them with the levers of the civil and ecclesiastical powers ; all having been considered and prudently weighed, I have thought proper to resolve the following articles :

Article 1. The government of the Department will order the Missions of San Diego, San Luis Rey, San Juan Capistrano, San Gabriel, San Fernando, San Buenaventura, Santa Barbara, Santa Cruz, La Purisima, San Antonio, Santa Clara, and San José, to be delivered up to the very reverend fathers whom the respective prelate may appoint to each of them, and said Missions shall in future continue to be administered by the very reverend fathers, as tutors to the Indians, in the same manner as they held them formerly.

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* The original of this decree exists in the archives, in charge of the Surveyor General of the United States in California.

ARTICLE 2. As policy makes irrevocable what has hitherto been done, the Missions will not claim any lands already granted up to this date; but they will collect the cattle, property, and utensils, which may have been lent by the priests or administrators, settling the time and manner in a friendly way with debtors or holders.

ARTICLE 6. The departmental government, which prides itself in being religious, and at the same time entirely Californian, and as such, interested in the same manner as each and every one of the inhabitants of both Californias, in the progress of the Holy Catholic Faith, and prosperity of the country, offers all its powers for the protection of the Missions, and, as Commandant General, the force of arms to escort, defend and sustain them, as it will likewise do in respect to individual and private property, and guaranties, securing to the owners thereof the possession and preservation of the lands which they this day hold, and it undertakes not to make any new grants, except on information of said authorities, of the reverend fathers, or where the lands are notoriously unoccupied, or in case of necessity.

ACT OF THE TERRITORIAL DEPUTATION OF CALIFORNIA, 12 MAY, 1834, IN RELATION TO THE MISSIONS. (MSS. ARCHIVES.)

FIRST—The vacant lands shall be distributed according to the Laws of Colonization.

SECOND—The Political Chief shall order a suspension of the extensive slaughterings of cattle which are taking place at the Missions, and will only permit the same in case of urgent necessity.

CALIFORNIA STATE LIBRARY.

J H McKeen

IN THE SUPREME COURT OF THE UNITED STATES.

ARGUMENT

IN THE CASE OF

CRUZ CERVANTES vs. THE UNITED STATES,

ON

APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE NORTHERN DISTRICT OF
CALIFORNIA.

DELIVERED ON THE 18th AND 19th OF MAY, 1854.

BY WILLIAM CAREY JONES,
OF COUNSEL FOR APPELLANT.

WASHINGTON:
GEO. S. GIDEON, PRINTER.
1854.

IN SUPREME COURT OF THE UNITED STATES.

CRUZ CERVANTES, APPELLANT,

VS.

THE UNITED STATES.

Argument.

The first questions that arise in this case relate to the assumed jurisdiction of the court below. The case is anomalous; as it has not, in the manner of its institution or prosecution, a feature in common with any case that ever before it was found in a court of law.

It was not instituted or prosecuted by either of the parties to it. It was either self-instituted, self-begotten, self-born, or else it was instituted by Mr. George Fisher, signing himself secretary. It was prosecuted by the judge of the court, (not by the court, for it was out of term time, but by the judge,) and in virtue of notice served on the clerk of the court.

It was instituted without any declaration, petition, or complaint, to inform the court of its nature or scope. It was prosecuted without any process or notice to the defendant to inform him of its grounds, or even of its existence.

It relates to land outside of the territorial jurisdiction of the court, and affects a defendant also outside of its jurisdiction, and never brought within it by process.

It was instituted and prosecuted in defiance of an express stipulation of one of the parties, and against the protest of the other.

The case that was instituted is not the case that was prosecuted; because, the prosecution commenced before the institution.

It is an appeal in advance of any original cognizance of the cause; reversing the usual, and heretofore considered necessary order, which requires an original action before an appellate can accrue.

I am justified, therefore, in saying, that a cause so begun, and so carried on, was never before entertained by a court of law, or a judge professing to sit as such; and that his proceeding in the premises was irregular, illegal, outside of his jurisdiction; not warranted in any of its features by law, by justice, or by the usage or practice of any jurisprudence known in the world.

The case has grown out of proceedings instituted before a certain commission or board of arbitrators, appointed under an act of Congress of 3d March, 1851, entitled "An act to ascertain and settle the private land claims in California." This act provides, among other things:

1. That a Board of Commissioners be appointed by the President and Senate to sit in California, and take cognizance of such claims as should be presented to them of lands held in that State under any right or title derived from the Spanish or Mexican governments; and, as such claims became respectively ready for hearing, to examine the same, and decide on their validity, and within thirty days thereafter certify their decision to the district attorney of the United States for the district where it was rendered.

2. That the party against whom the decision of the commissioners should be rendered might present a petition to the district court of the district where the land lay, praying that court to *review* the decision of the commission, and to decide on the validity of the claim; this petition, if presented on the part of the claimant, to set forth fully his title; if presented on behalf of the United States, to set forth "fully and distinctly the grounds on which the claim is alleged to be invalid;" a copy of the petition to be served on the adverse party, or his attorney, and he allowed to answer or traverse the same.

3. That on the pleadings and evidence in the case, and such further evidence as might be taken by its order, the district court should proceed to render judgment; and, on application of the party against whom the judgment was given, should grant an appeal to this supreme court.

4. That to entitle either party to this review of the decision of the commissioners, a notice of the intention of such party should, within sixty days after the decision of the commissioners was made and notified to the parties, be entered on the journal of the commission, and within six months after the decision was rendered the petition should be filed.

5. That for all claims finally confirmed by the commission, or by the district or supreme court, a patent should issue, on the presentation of a certificate of the confirmation, and a survey of the land approved by the surveyor general, whose duty it should be, to that end, to cause to be surveyed all the lands thus finally confirmed.

6. That the final decrees rendered by the said commissioners, or by the district or supreme court, or any patent issued under the act, should be conclusive between the United States and the claimant.

The Board of Commissioners thus provided for sat at San Francisco, on the 21st January, 1852, as the agents of the United States; and on the 20th February, 1852, Cervantes—the appellant here—made them his agents also, and accepted the mode and terms proposed, for ascertaining and settling his claim to the land in question, by presenting his case according to the provisions of the act. The commissioners thus became, by mutual consent, and they could not so become in any other way, the referees or arbitrators between the United States and Cervantes, with authority (by virtue of this same consent) to receive testimony on either side, and to decide on the validity of the claim of Cervantes, according to the principles laid down in the act.

It is, then, in this aspect that I shall regard the case; namely, as one altogether between the United States and Cervantes, and the act of 1851 as an agreement of reference between them, and, for the purposes of this cause, to be regarded solely as a private act of the parties; as much so, as if entitled an act to ascertain and settle the land claim of Cervantes, and conditioned to go into operation on his acceptance of it; for, so far as he is concerned, it was so entitled and so conditioned.

The commission, then, or arbitrators, thus empowered, proceeded in the cause until it became ready for hearing; heard it; and on the 3d of August, 1852, decided it—decided the point submitted to them—decided "on the validity of the claim"—and decided it to be valid.

Subsequently, i. e. on the 31st of August, 1852, Congress made the following enactment, in the midst of the civil and diplomatic appropriation act of that year, namely:

> "And in every case in which the board of commissioners on private land claims in California shall render a final decision, it shall be their duty to have two certified transcripts prepared of their proceedings and decision, and of the papers and evidence on which the same are founded, one of which transcripts shall be filed with the clerk of the proper district court, and the other shall be transmitted to the attorney general of the United States, and the filing of such transcript with the clerk aforesaid shall *ipso facto* operate as an appeal for the party against whom the decision shall be rendered; and if such decision shall be against the private claimant, it shall be his duty to file a notice with the clerk aforesaid within six months thereafter of his intention to prosecute the appeal; and if the decision shall be against the United States, it shall be the duty of the attorney general, within six months after receiving said transcript, to cause a notice to be filed with the clerk aforesaid, that the appeal will be prosecuted by the United States; and on the failure of either party to file such notice with the clerk aforesaid, the appeal shall be regarded as dismissed." (Stat. at Lar., Sess. 1851–2, p. 99.)*

And subsequent to this these proceedings took place in the commission, namely:

On the 18th December, 1852, two of the members of said commission read each an opinion on points of said case, and also a paper entitled a decree of final confirmation. (pp. 7, 44, 49, 50.)

On the same day, the Board made an order that the "opinion of the Board," delivered on the 3d of August previous, together with the several opinions and the "decree of final confirmation," that day delivered, should be "recorded on the journal." (p. 7.)

Under color, or supposed warrant, of which last mentioned enactment and of those proceedings in the commission, we infer that these subsequent acts were performed, namely:

On the 11th of July, 1853, Mr. Cushing, Attorney General of the United States, gave a notice (p. 98) "to the clerk of the district court of the United States for the northern district of California," in the following words:

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*[Note.—For convenience, the act providing for the organization of the board, and the above clause, will be respectively referred to in this argument, as the act of 1851, and the act of 1852.]

"*Cruz Cervantes, claimant*, vs. *The United States*.

"ATTORNEY GENERAL'S OFFICE,
"WASHINGTON, D. C., *July* 11, 1853.

"You will please take notice, that the appeal in the above case from the decision of the commissioners to ascertain and settle the private land claims in the State of California, to the district court of the United States, for the northern district of California, will be prosecuted by the United States.

"C. CUSHING, *Attorney General, United States*.

"TO THE CLERK OF THE DISTRICT COURT OF THE UNITED STATES,
for the northern district of California."

On the 22d July, 1853, George Fisher, signing himself secretary, the person whom I say instituted the cause, if it were not self-instituted, certified to certain manuscripts, purporting to be a transcript of various proceedings and evidence on file in his office. (p. 98.)

What Mr. Fisher did with this transcript is not shown, by any endorsement or entry; but as it is found in the clerk's office of the court of the northern district of California, it may be reasonable to infer that on or subsequent to said 22d July he placed it there; (though, in any aspect of the case, the fact, and the time of it, ought positively to appear.)

Cervantes, by outside report, heard of these proceedings; and went before the court to protest against them, and move them to be dismissed. But he did not enter any appearance in the case, nor forego any of his rights in the premises, growing out of want of process, or in any other respect. I argue, then:

I.—The court had not jurisdiction of the land or the defendant.

1. The subject matter of the cause (i. e. the land claimed by Cervantes) is not in its jurisdiction.

The northern district of California comprises only that part of the State north of north latitude 37°, (9 Stat. at Lar. 521,) and the land in controversy is south of that line; consequently outside of the district, and of the jurisdiction of the court.

This fact was brought directly to the notice of the court, by the denial of Cervantes, in his protests and motions against the assumed proceeding of the court. (p. 102.)

No counter allegation was made, nor any attempt to prove the locality necessary to give jurisdiction, or to obviate the difficulty in any way. In fact, the case being the first that ever found itself before a court of record without process or pleadings to ascertain the matters in issue, precedents do not show, perhaps, what would have been the proper course of the actor in the case. But the denial of the jurisdiction—i. e. the denial of the fact necessary to give jurisdiction—by Cervantes, made it incumbent on the other side to show that fact, in some legal manner, affirmatively. This not having been done, the denial of Cervantes stands good; for, even with the proper averment on the other side, the traverse of it by Cervantes would make it necessary for the fact to be proved. There are questions of jurisdiction, that (the proper averment being made in the institution of the case) must be raised by plea in abatement, and the burden lies on the one who makes the plea. An example is in 14 How. 510. The plea was to the jurisdiction, on the ground that the plaintiff was a resident of the same State with the defendant; and the necessary allegation having been made in the declaration, it was held to be prima facie evidence of the fact alleged, and the burden of proof was consequently on the party taking the exception. But this is not such a case. This is not a question of residence, or of the right of the parties to sue, as incident to residence; but it is a question whether the *subject matter* of the controversy is in the jurisdiction, and could have been taken advantage of (even were the case prima facie made out in a declaration or petition) on the general issue, (2 Gal. 345,) where of course the plaintiff must make good his averments.

[Before I pass from the case in 14 How., I ask the especial attention of the court to what is there so justly said of the necessity of keeping out incongruities and anomalies in the proceedings of courts of justice.]

If this cause, then, had been made up in the usual form, and this denial of Cervantes had been to an averment properly made by the plaintiff, it would have raised a question going to the gist of the action, triable on the general issue, in which the plaintiff must make good his position. Is the plaintiff better off by not having made any averment? That would be profiting by his own laches, which justice will not tolerate. On the contrary, the denial of Cervantes, standing alone, is to be taken as a true allegation, which, not denied, must be held to be confessed; on the same principle (as well as for other reasons) that the necessary averment in the case in 14 How. was held to be *prima facie* sufficient, and the burden of disproving it thrown on the party who should impeach the alleged fact. Certainly, the rule is, that the party alleging a fact is the one who ought to prove it; but a plaintiff cannot escape the responsibility of maintaining his action, and throw the burden of the cause on his adversary by omitting necessary averments, and so transforming the defendant's negatives into affirmatives.

As for the *manner* of the denial on the part of Cervantes, it was the best he could do, since the case, as already shown, was before the court without declaration, petition, complaint, citation, bill, or statement, or notice or process of any kind to which he could respond by plea or answer; and the only way open to him to bring the obstacles to its jurisdiction to the notice of the court was, by motion to dismiss. This was also the proper mode. (2 Peters, 554.)

If a suit be brought by a citizen of Ohio against a citizen of Missouri in the proper federal court of that State, concerning a piece of land, and the case come to this court by appeal or writ of error, and it happen that the value of the land is not alleged, and does not positively appear, I suppose a suggestion of the fact would cause the dismissal of the case; and if the appellee added to this suggestion an allegation that the land was not, in point of fact, worth the minimum that would give this court jurisdiction of the case, I suppose he would not thereby be put to the proof of that negative, unless, along with other anomalies of this case, it is henceforth to be held that the negation of a fact raises a presumption of its truth. The cases I consider to be exactly parallel.

2. The party defendant (the appellee, so called) was not in the jurisdiction of the court.

This rests partly on the same ground as the foregoing, and partly on the want of process and service. Cervantes resides on the land which is in controversy, and that is in the southern, and not in the northern district; and of the fact he put the other party to the proof, by denying that he was within the jurisdiction; and no proof (or even counter allegation) was offered.

The fact of his non-residence in the district would not affect the case had he been found within the district, and process been there served on him. But no process was issued or served, at any time, or in any place, nor any notice given to him, or to any one for him, of the pendency of the action, or that any proceeding in the premises was in progress or in contemplation. This was against both positive and natural law; against morals, against the "immutable principles of justice," as this court has often said, and against the statute. The 11th section of the judiciary act of 1789 prescribes that no civil suit shall be brought before either the circuit or district courts, by any original process, in any other district than that whereof the defendant is an inhabitant, or may be found at the time of serving the writ.

But it will be said that this case was not before the court on *original process*. It was there, however, on original process, or there was no case there at all; because, the time that a case first appears in a court, that court, if it entertain it, is in the exercise of original jurisdiction; and appellate jurisdiction only arises when it passes into a second court; and the district court was the first court into which this case was introduced or entertained. In either aspect, however, Cervantes was under the protection of that clause of the act of 1789.

The intention of the act of 1789, and of every act in relation to the judiciary of the United States, is that no one shall be held to answer in a civil suit without notice, nor without personal notice, except in those cases where the exception is for his benefit, and the constitutional rights of defendants cannot be otherwise saved. Section 12 sets forth the only instances (with the exception of those cases that come from the highest State tribunals into this court) in which a civil suit can get into the federal courts without personal service of process on the defendant. Those instances are where a suit is brought in a State court against an alien, or by a citizen of the State against a citizen of another State; in which case, the manner of the process has, of course, been according to the local law; and the act of Congress steps in to save the constitutional rights of the defendant, by providing for the removal of the cause into the federal courts. And it is to distinguish between these cases and cases commenced in the federal courts, that the restrictive words "by original process" are used in the 11th section. They are not used to intimate that causes may be got there without any process at all.

It will be contended, however, that this is a case of special jurisdiction, depending on the special acts of Congress above quoted. In a subsequent part of my argument, I shall expect to show that these private acts cannot claim the *same authority* as the judiciary act; both acts of Congress, certainly; but one—the judiciary act—the work of that body in its law-giving, governmental faculty, and so ranking in the category of *laws;* the others—the special acts—mere private enactments, of no authority, obligatory on nobody, except where the consent of the parties to be affected by them shall have given them force as contracts; consequently, that they could not operate to repeal *a law*. At present, I confine myself to showing that those acts do not *propose* to supersede the general law, or to get a defendant into court without notice; that under those acts, considered alone, and supposing them to have the effect of laws, Cervantes was not before the district court, nor in its jurisdiction.

The first of those special acts provides a mode in which questions between the United States and adverse claimants to lands in California may be brought to trial in the federal courts; and this is in accordance with the constitutional provision which makes all cases to which the United States are a party cognizable in the federal courts. This act provides not only for a notice of the institution of the action, but of its nature and causes, and the ground on which it is prosecuted. It does not require necessarily a personal service on the defendant, but it may be on his attorney. Nor does this violate the general principle, because it is still in the power of the defendant to compel personal service, by not allowing an attorney to represent him; and he is thus maintained in the privileges accorded by the judiciary act, since personal service is a personal privilege, that may be waived.

This provision of the act of 1851, whatever else may be changed, is not attempted to be superseded by the enactment of 1852. That act seems to intend a change in the mode of proceeding before the district court, and to substitute an *appeal* from the decision of the commissioners for the bill of review provided for by the act of 1851. But it does not intimate that this *appeal* shall be brought without citation or notice to the appellee. It does not in terms repeal any portion of the former act, and of course cannot be construed to repeal any portion except where the two may be irreconcilable. If we compare them, then, we shall find there is no provision of the act of 1852 that is irreconcilable with the act of 1851, except the single one of keeping the question of a re-examination of the decisions of the commission open during a longer space of time than the act of 1851 provides for. It may, also, supersede the necessity on the part of the commission of reporting its decision to the local attorney, because it provides that the notice which was to have been given to that officer shall be given to the attorney general; and also to do away with an entry on the journals of the Board of the intention to prosecute the case in the federal tribunals, because it provides other steps to answer the same purpose that that notice was intended for. Hence, it may be supposed that the act of 1852 intended to supersede those provisions of the act of 1851.

But the act of 1852 does not provide any substitute for the notice which the general law *prescribes*, and the act of 1851 *undertakes*, shall be given to the party against whom the proceeding is had; consequently, that provision is not attempted to be repealed or superseded. A *different* enactment will not effect a repeal; it must be a *contrary* one. (7 Mart. N. S. 434.) This is the ordinary rule, and much more strictly applied where provisions are in question, which would change the common course of proceeding; certainly not to be relaxed when it is in question to disregard fundamental principles and invade universally recognised rights.

If it be said that the word *appeal* changes the character of the proceeding, and relieves it of the obligations in respect of process and service prescribed for original suits, the reply at once occurs, that the act of 1852 gives no directions for the manner of conducting the appeal, and we must consequently look either to the general law of the subject or to the special act of 1851. The general law in relation to appeals requires a citation to the appellee, or, what is equivalent, that the appeal be taken in open court, where both parties are supposed to be present. (2 Wh. 132; 8 How. 106.) This is the law of bringing *appeals* in the courts of the United States; and if the private act of 1852 be supposed competent to take this case out of the general rule, yet it cannot be so construed unless its language were imperative; and this it is not, but the legal and natural inference from the words of the act is to the contrary.

I am convinced that it was not the intention of the authors of the act of 1852 to change the act of 1851 in the respect now under consideration, nor in any respect except to *enlarge the time* in favor of the United States for exercising their discretion in respect of bringing the review which the act of 1851 provides for, and to shift the discretion in this particular from the district attorney to the attorney general. That this was the *sole object*, I have no doubt; and to that effect it was in fact announced by the chairman of the finance committee in the Senate, who introduced the provision as an amendment to the general appropriation bill; and it was adopted by the Senate on that representation. (Congressional Globe, v. 24, p. 2342.) It is nearly certain that there was no *purpose* to change the mode of review. The word *appeal* has a broad and a narrow interpretation. (1 Gal. 5, et seq.) The law officers of the United States, both in California and here, have given it in the present instance its narrowest and strict technical application; and it may be that the haste and inattention with which the amendment was hurried through Congress may have left it in such a shape that this construction is necessarily given it, however well we may know the contrary was intended. If this court should think so also, then it can only be said, that the amendment has overshot its mark, since an appeal, technically so called, could not, by virtue of any enactment, be made to lie from a tribunal composed like this evanescent commission, to a court organized under the Constitution. But, whether the act contemplates a bill of review, as prescribed in the act of 1851, or proposes to change that proceeding into an appeal, it gives no warrant for supposing that it was to be commenced and to go through without process or notice.

But suppose it be the meaning of the act of 1852 that Cervantes shall be ruled to be in court, and the court authorized to proceed and adjudge his rights, without the service of any notice or process; that the act itself be constructive notice, and he, by virtue of it, put upon his guard to watch the clerk's office and know whether and when proceedings were had against him; yet surely it could not thus put him on his guard with reference to *more than one district*, and that "the proper" one—the district where he lives and where his land lies. If an enactment of Congress could have such an operation—could thus authorize a litigious proceeding against him, without notice directed to him personally—then it was at Monterey, or Los Angeles, where the court sits in whose jurisdiction he and his lands are, that he should be on the watch; otherwise, he might be required to attend all the district courts of the Union; for this cause could, with as much propriety, be brought in the district court of any of the Atlantic States, as in that of the northern district of California. The act, then, at the most, was not constructive notice to Cervantes in more than one district, and that the district where his land lies, and where alone it can be litigated, namely, the southern district.

Beyond this, however, lies what I consider to be fundamental law, namely: that it is not in the power of Congress by a legislative enactment—by its own volition merely—to bring a defendant into court. Congress has power to establish courts, and to prescribe, under the Constitution, their jurisdiction and modes of procedure. But this grant was given for the furtherance of justice, and must be exercised in pursuance of that end, and in subordination to those ideas and facts which the establishment of judicial courts presupposes, namely, tribunals before which parties litigant, being fairly met, without chicane and without surprise on either side, are capable of judging between them, and speaking the law with reference to the persons and the subject matter.

Now the ends of the constitutional grant would be thwarted, and those principles which necessarily attach to the exercise of jurisprudence be violated, if Congress could enact, even as between third persons, an adjudication of the rights of defendants without process or notice to them; and how much aggravated the case, if as *between themselves* and another party the United States, through Congress, their agent, could establish such a rule. The clause of the Constitution which provides that the jurisdiction of the federal courts shall extend to all cases in which the United States are a party, intends the very opposite of this: intends to provide a tribunal which, free from legislative or political interference, shall judge impartially between the United States and an adverse party, as between any other litigants. Yet what si attempted here, (if the construction given by the court below to the act of 1852 be correct,) is to *legislate* Cruz Cervantes into court as a defendant, without process or notice. This was beyond the power of the United States, as beyond the power of any other actor in a litigation: the United States, in a litigation, being no more than any other legal person, and no more entitled to make or to speak the law of the case.

"Jurisdiction is acquired in one of two modes: first, as against the *person* of the defendant, by the *service of process;* or secondly, by a procedure against the *property* of the defendant in the *jurisdiction of the court.*" 9 How. 349.

"No principle is more vital to the administration of justice than that no man shall be condemned in his person or property *without notice.*" *Ib.*

"And every departure from this fundamental rule, by a procedure *in rem* in which a notice by publication is substituted for a service on the party, should be subject to *strict legal scrutiny.*" *Ib.*

"Jurisdiction is not to be assumed and exercised in such cases on the *general ground* that the subject matter of the suit is in the power of the court." *Ib.*

"No person is required to answer in a suit, on whom process has not been served, or whose property has not been attached." 11 How. 459–60.

3. The circumstances to give jurisdiction are not averred, and do not appear in the record.

The decisions of this court to the effect that the facts necessary to give jurisdiction must be averred, are so numerous and pointed, and the reason of them is so apparent and so obligatory, that it would seem that the bringing of this single fact to the notice of the court below ought to have disposed of the case in our favor, and of itself be sufficient here. The decisions on this point begin almost with the existence of the court. In 3 Dal. 382, the court "were clearly of opinion" that it was necessary to "*set forth*" the facts that should give jurisdiction; and, because the record was defective in that particular, dismissed the case. This decision was confirmed in 4 Dal. 7; and the same principle maintained, after argument, in 4 Dal. 8. The case came up on writ of error from the circuit court of North Carolina, and the error assigned was an insufficient description, not of one of the parties, but of the original holders of a bill on which the action was brought; and as section 11th of the Judiciary act requires the assignor of a domestic bill, as well as the assignee who brings the suit, to have been capable of suing in the federal tribunals, this court held that there was error, because the facts were not sufficiently set forth in regard to the assignor, and the judgment was reversed. In 1 Cr. 343, the defendant took advantage by a writ of error of a like omission in reference to the parties to the action; and so precise and obligatory was held the rule, that the judgment was reversed, without argument, though the objection was merely technical. The same in 2 Cr. 9, where the omission was but a single word, the defendant being described as "*of* the State of Georgia," instead of a "*citizen of*," &c. In 2 Cr. 126, the rule was held so inflexible that the plaintiff below, who had been cast in his own suit, was allowed to take advantage of it, because "it was the duty *of the court* to see that it had jurisdiction, and consent of parties could not give it." And so, I contend here, that even had Cervantes *consented* to go on, the court would not, on the record, have had jurisdiction, and its judgment would now be reversable for that cause. In 8 Pet. 112, the defendant was described as "citizen *or* resident," &c., and held that the use of the alternative was fatal. In 10 Pet. 160, this court, after the cause had been argued, took notice, of its own motion, of the non-appearance on the record of the facts necessary to give jurisdiction. The *onus probandi*, say the court, is on the party seeking to obtain a revision of the case to establish the jurisdiction (of the revising court.) "It must appear on the record," or (under the circumstances of that case) by affidavit. This was not the case, and the writ was dismissed. The case of Cervantes is much stronger. The party (the United States) seeking to obtain a revision not only did not attempt to show affirmatively the jurisdiction of the revising court, but it did not contradict the counter allegations of Cervantes. Perhaps it would have been competent for the United States, in the case before us, as the Supreme Court held it would have been for the plaintiff in error in this case in 10 Pet., to show the jurisdiction by affidavit; but they did not do it. So, in 9 Wh. 650, the court of its own motion directed the writ to be dismissed, because the facts necessary to its jurisdiction did not appear.

"Jurisdiction must appear from the *facts stated*, and those facts can be stated only on the record." 5 Pet. 255.

"We state with confidence that this court has *never taken jurisdiction* unless the case *stated in the record*" brought it within the jurisdiction. *Ib.*

"The decisions of this court require that the *averment* of jurisdiction shall be positive; that the declaration shall *state expressly* the fact on which jurisdiction depends. It is not sufficient that the jurisdiction may be *inferred argumentatively* from the record." 8 Pet. 115.

Like decisions might be quoted indefinitely from the reports of this court. What is already cited is sufficient to show, that the case ought not to have been adjudged in the court below, for want of the proper averments of the facts necessary to give jurisdiction; because the party seeking a revision did not affirmatively show the jurisdiction of the revising court. A recent decision (of the present term, and not yet reported) is supposed to have relaxed, in a degree, the stringency of the foregoing cases. But I do not understand that decision as relaxing the rule, that the circumstances to give jurisdiction must appear, but only as holding that in that particular case the necessary averments were made. The difference of opinion was not, whether the jurisdiction must necessarily appear, but whether it did appear; and the decision was, not that the showing was unnecessary, but that the showing was made. Moreover, if there have been, by the decision referred to, any modification of the views of this court, it is to the end of giving fuller scope to the constitutional right of resort to the federal courts by citizens of one State impleaded by citizens of another. Whereas in this case, the practice proposed to be recognised would take away valuable natural and constitutional rights.

It is impossible, however, that the rule which requires the circumstances which give jurisdiction to be set forth should be released. The legislative power is not competent to dispense with it, because it is a necessary consequence of the constitutional enumeration of the cases to which the federal jurisprudence may extend. The legislature cannot, of course, authorize those courts to take cognizance of any other cases than are thus embraced, nor, consequently, of any that do not appear to be thus embraced. Nor is this rule confined to the federal courts. It applies to all courts whose jurisdiction is defined. As, for example, in the different States the laws (perhaps universally) require that cases concerning lands shall be tried in the county where the land is situated; a declaration that should omit to state that the land sued for was in the proper county would be held bad on demurrer; or the omission, if not supplied by proof, might be taken advantage of at the last moment, or on writ of error. The rule may therefore be laid down, in this broad extent, that in all cases where courts have a defined jurisdiction, the facts necessary to show the particular cause to be within the defined limits must appear, or the proceedings are without authority. Inasmuch, then, as the territorial jurisdiction of the court below only extends southward to the 37° N. latitude, there ought to have been an affirmative showing that this land is north of that line, and that for want of it the jurisdiction ought not to have been entertained.

But suppose, contrary to the citation from 8 Pet. 115, the court could have gone into the record to argue inferentially its jurisdiction. The facts and inferences found there would not help the matter. The claimant, in his original petition for a grant of the land, (Record, p. 84,) describes it as bounded on the north by San Felipe, (meaning a tract of land known by that name,) and on the west by the plain of San Juan; and in his second and more definite petition, (p. 85,) accompanied with a map of the land, he describes it as bounded by a dry creek opposite (south of) the creek of San Felipe, (which runs through the tract of San Felipe,) and west by the plains of San Juan. Again, the report of the ayuntamiento of Monterey, (p. 85,) to whom the governor had referred the petition, states the land to be appurtenant to the mission of San Juan Bautista; and all these indicate the southern district, since all the objects mentioned (as we may see by any map of the State) lie south of 37°, the plain of San Juan taking its name from the mission of San Juan Bautista. Mr. Commissioner Hall, in his opinion, (p. 44,) says, indeed, that at the time of the delivery of the opinion of the Board, it was a "matter of doubt" which district the land lay in, "rendering it uncertain to what district attorney" the decision should be certified, under the 8th section of the act of 1851. If this were, however, a matter of doubt with the commission, it was a doubt that could have been removed by a very little examination and inquiry, and the counsel of Cervantes took pains to remove any scruple the commission could have had in reference to it, by entering (p. 6) a formal *admission* that the land lay (where it does actually lie) in the southern district. It is very plain, however, from the subsequent statements of Mr. Hall, and from the "final opinion," as it is called, of Mr. Commissioner Thornton, (p. 49,) that that "doubt" was not a reason with the Board for withholding what they are pleased to call their decree of final confirmation; for they "suspended," in like manner, three other cases in which there could be no possible doubt at all;

two of them lying on the Bay of San Francisco, near the city, and the third on the Upper Sacramento; and moreover, the act of 1851 directed in plain words that the commissioners should certify their decisions to the district attorney of the district "where the decision was rendered." But if it had been, and still were, a matter of doubt in which district the land is, I do not perceive that the difficulty is obviated; but rather that that doubt alone ought to have put the United States to an allegation and to proof, to clear up the doubt, since the proceedings of a court are only valid to the extent that its jurisdiction *appears*. (4 Dal. 11.)

The attorney general (brief, p. 3) says that the question whether the land is or is not in the northern district, is a question of fact, not of law, and that there is nothing in the record to show that it is not there. I presume this is the first time that it has ever been supposed that a defendant had lost his case because he had failed, in the absence even of an allegation on the part of the plaintiff, to prove the negative of the case. Certainly it is a question of fact; but a fact necessary to be affirmatively shown by the plaintiff (or appellant) before his case can be entertained, and proved by him if it be denied. So, if a case come here on appeal, (as already said,) and the value of the thing in controversy is necessary to maintain the jurisdiction, that value is also a question of fact, but the appellee has nothing to do with the proof of it; the appellant must show it affirmatively, or the court will dismiss his case.

But the attorney general also supposes that there is enough in the record to *argue* the jurisdiction from. This is not admissible, as jurisdiction cannot be taken *arguendo*. That must appear. But let us see the argument. The claim of Cervantes, he says, is described in the petition as situated in the county of Santa Clara, and "the county of Santa Clara" may be seen on the map, and the 37° of north latitude leaves by far the greater part of the county north of that parallel. In the first place, this petition of Cervantes is not binding on him, in any respect, since it was not presented of his own motion, nor required by law, but he was coerced into it by an arbitrary rule of the commission; secondly, the whole of the county of Santa Clara is not north of 37°, and the same map that shows that the largest part of it is so, also shows that the arroyo of San Felipe, which is north of the tract, and so shown both in Cervantes's petition to the commission, in his petition to the governor for the grant, and in the grant itself; I say that the same map that shows the larger part of Santa Clara county to be in the northern district, shows that the arroyo of San Felipe, which is north of the northern line of Cervantes, is in the southern district, and that the arroyo of Santa Anna, which is the south line of the tract, is at least a quarter of a degree south of 37° N. The proof in the case shows, moreover, (p. 63,) that the land is south of Pacheco's Pass, and the same map quoted by the attorney general shows that Pacheco's Pass is south of 37° N. The description in the petition to the board is erroneous in representing the land to be in Santa Clara county, and is so shown in the proof. The land is in the county of Monterey, (Rec., pp. 63, 65,) and all of the county of Monterey is in the southern district. It is also erroneous in describing the tract as bounded on the north by the arroyo of San Felipe. It is bounded by the tract or rancho of San Felipe, through which the creek of San Felipe passes; and this is shown in the second petition of Cervantes to the governor (pp. 78 and 85); in the juridical measurement, (p. 55,) and in the map of the land. This documentary and oral testimony was the claim and the proof of it offered in the case; so that it stands *proved in the record*, that the land was in the southern and not in the northern district. Even supposing the petition to the Board to be an admission, and binding on the claimant, yet the same map that the attorney general argues from, shows that all of Santa Clara county is not in the northern district, and that the only object mentioned in the petition; which is in that county, namely, the creek of San Felipe, is in the southern district.

The attorney general is mistaken in supposing that the line of 37° has not been run and marked in California by the constituted authorities of the United States. It has been run and ascertained by the deputy surveyors of the United States, and their returns are in the surveyor general's office in San Francisco, and I presume in the land bureau here, and the town (ancient mission) of Santa Cruz is the initial point on the seacoast, and these surveys exactly tally with the official map of the State which I have referred to, and a proved copy of which is in the record of Frémont's case, No. 182. The record, therefore, and the authority cited by the attorney general, *prove*, not inferentially only, but positively, that the land is in the southern district. The judgment of the court argues nothing in the premises, as the attorney general supposes; and is not to stand good if proof be not brought against it; it only stands good according to what is actually shown in its favor.

But I contend not only that there ought to have been an affirmative allegation of the fact necessary to give *territorial jurisdiction*, but that the record ought *to show* a compliance in all particulars with the statute which directs the appeal; for example, it ought to show that the *commissioners* caused the transcript to be filed, because that is what the statute requires, and the record does not show it; and the fact is that they did not cause it to be done or give any directions about it, and there cannot be any intendment of law that they did unless the fact appears; it ought to be shown when the transcript was received by the attorney general, and when his notice to prosecute was received, that it might be seen that the six months were not passed, and in the same connection when the transcript was filed in the clerk's office. Essential rights depend on these facts, and thus ought to appear, that the court may know their jurisdiction, for without knowing it they cannot proceed. It is not in the power of the appellee to prove or disprove all these things, even if so unreasonable a demand could be made of him. Yet they ought to be known, both for the security of his rights, and to show the jurisdiction of the court; and all the knowledge and all the evidence are in the hands of the appellant below. If the court were allowed to *conjecture* on the subject, the conjecture would most reasonably be in this case that the facts, if they appeared, would oust the jurisdiction in these respects. The last act assumed to be performed by the commissioners was on the 18th of December. Allowing twelve days—certainly an ample time—for preparing the transcript, and thirty days each way for transmission, which is the utmost space consumed, and we shall find that more than the prescribed time had elapsed; thus, the transcript ought to have been mailed 1st January, the time that the mail leaves San Francisco, in which case it would be received by the attorney prior to 1st February, and he ought then to mail his notice at the latest on the 1st July; whereas it appears not to have been written until the 11th, and consequently could not have been mailed from New York till the 20th, nor received in San Francisco till near the last of August. But the facts ought *to appear*. If it be not necessary for them to appear, how can it be known in any instance whether the jurisdiction is rightly exercised? Whether the right has not accrued to the appellee that the appeal shall be dismissed, and he have his survey and patent? I am convinced this court will not sanction such a loose, indefinite, indeterminate practice, involving and endangering such important rights.

Official map of California, by Wm. M. Eddy, surveyor general: New York, 1854. Frémont's map of Oregon and Upper California: Washington, 1849. Record, pp. 63, 84, 85. [These maps, in connection with the descriptions of the property in the record, show that the rancho or tract (that of San Felipe) which lies north of the land in controversy is south of N. lat. 37°.] Jones's Report on Land Titles in California, Senate Doc. 18, 2d sess. 31st Cong., p. 118–19, (Mission S. Juan Bautista.)

II. That the action was not brought nor prosecuted in the court below in the manner nor within the time prescribed by law.

1. As to the manner:

It has been intimated, that the act of 1852 (or rather its authors) did not *intend* to change the mode of reviewing the decisions of the commissioners prescribed by the act of 1851; but only to enlarge the time, and to shift the discretion of determining on the propriety of instituting proceedings in the federal courts; and the more the question is examined, and the absence of any motive for changing the mode considered, the more clearly, I think, it will appear, that the word *appeal* is used in the act through a misapprehension, and by inadvertence. The chairman of the Committee on Finance, (Mr. Hunter, of Virginia,) who reported the amendment to the Senate, used this language (Cong. Globe, vol. 24, page 2342) in introducing it:

> "The residue of the amendment [i. e. the part under consideration] is for the purpose of protecting the interests of the United States, and *extends the time within which appeals may be taken.*"

At that time there was no act or clause providing for "appeals" to the district court, but only the provision above cited for a *review*, in the nature of an original action; consequently, Mr. Hunter was certainly under a misapprehension in supposing he was providing an extension of time for taking appeals. Yet, in familiar language, and for brevity, the proceeding provided for by the act of 1851 was often called (and perhaps in some sense not improperly) an "appeal."

The distinguished lawyer (Mr. Berrien) who reported the bill of 1851, from the Judiciary Committee of the Senate, himself, on one occasion, (Cong. Globe, vol. xiii, p. 373,) so denominated it; though in his opening remarks, (ib. 384,) and other portions of the debate, (ib. 438–'9,) he shows that he had present in his mind, in preparing the bill, the signification and distinctive features of an appeal proper, and did not propose such a proceeding from the commission to the district court. I suppose, then, that there is not any doubt that the object of introducing the amendment of 1852 was merely to enlarge the time for prosecuting the remedy already prescribed, and that the term *appeal* was used under the mistaken supposition that the existing provision was for appeals, and without reflecting on the incongruity of a proceeding of that nature with the relative office and position of the commission and the federal courts. It is said, in 1 Cr. 35, "that a legislative act, founded on a mistaken opinion of what is law, does not change the actual state of the law as to pre-existing cases." How far a court may go to presume a mistake in the legislature, and to save the intent of a statute by disregarding its words; or whether, in the present instance, the word, being found in a statutory enactment, must not be held to its legal signification, and to the signification which it has in other statutes of the United States, I do not think is material to this case; because, if the *intent* be saved, and the *manner* of the remedy of the act of 1851 be held not to have been changed, it is plain that the necessary steps were not observed in this case; or, if the *words* be saved, and it be held that the review has been abolished by the attempted substitution of an appeal, then I think it equally certain that an appeal in such a case will not lie. The attorney general has chosen the latter alternative, and I am willing he should have the benefit of it. I will still, however, present the point for consideration; and I find that, in a question bearing analogy to this, some of the circuit courts have gone behind the positive words of a statute, to ascertain the evils intended to be remedied, and narrowed the scope of the act to that intent. I refer to the construction that has been given to the 2d section of the judiciary act of 1803, (2 Stat. at Lar. 244,) which, though it provides that "from *all* final judgments or decrees in any of the district courts where the matter in dispute exceeds the value of fifty dollars, an appeal shall lie to the circuit court, and the circuit courts are authorized and required to hear and determine such appeal," has nevertheless been held (in view of the evils the act was supposed to be designed to remedy, and confining it to that end) to intend only cases in admiralty and equity, and appeals in common-law cases are not allowed under it. (1 Gal. 5.) The word "appeal" is constantly applied to every description of proceeding wherein a superior tribunal revises those of an inferior. 3 Bl. Com. 406–'7. The revisory power of the House of Lords over the decisions of the court of chancery in England, is technically called an appeal, though it begins by petition. Ib. 554.

So again, in another sense, two persons who have a dispute proper for judicial examination, not being able to determine it between themselves, may say: we will *appeal* to the law; or we will *appeal* to the court; but the court, nevertheless, into which it is introduced will be in the exercise of original, not appellate, jurisdiction.

Taking the words of the act of 1852 as they are, however, and supposing that it prescribes an "appeal" from the commission to the district court, I contend that the act was not complied with in the institution of the case :

And first, that George Fisher, signing himself secretary, was not an officer known to the law, or whose certificate, even authenticated by his "private seal," was competent to verify a judicial record. He was not an officer of the United States, because such officers can only be appointed by the president and senate, by the president alone, by the courts of law, or the heads of departments, (Constitution, art. 2, sec. 2, and 13 How. 51,) and he was not so appointed; such officers must also be commissioned by the president, (ib., sec. 3,) and he was not so commissioned ; nor does any act of Congress, public or private, authorize, or assume to authorize, his certificate or verification to be received in a court of justice for any purpose. If his certificate in the present instance were in the capacity of secretary of the Board, there is nothing of which judicial notice can be taken to show that he was such secretary, and moreover the duties of the secretary of the Board are all prescribed in the act of 1851, and that duty is not among them. If it had been competent, then, under any existing act, for the proceedings of the commissioners to verify themselves to a court of law by a mere certification, then the certificate ought to have been from the commissioners, who were at least officers commissioned by the President, and might be officially known; whereas Mr. Fisher, whether their secretary or not, was not an officer, in any legal sense, and could not be officially or judicially known. But the commission appointed under the act of 1851 is not *a court;* or, whatever else it may be, it is not a court of record; it has not a seal; and if it had a seal, it would be its seal, and not Mr. Fisher's seal, that should be used; consequently, its proceedings do not verify themselves; they must be proved like any other fact. The district court, then, had nothing before it of a judicial character, or with a sufficient verification to authorize it to proceed. In the cases of the United States *vs.* Hodge, 3 How. 534, and United States *vs.* Villabolos, 6 How. 81, and other like cases, this court dismissed the appeals because the citations were signed by the clerk of the court, instead of by the judge or by a justice of this court, as required by statute. The clerk, however, was an officer of the United States, and of a tribunal constitutionally organized; and the citation bore the seal of the court, and gave actual notice to the adverse party, as well as if it had been signed by the judge; but it did not conform to the statute, and that was held to be as fatal as any the most substantial error. In this case, the objection is not to a defect in the manner of mere process, but to a fault that cuts at the root of the whole case. The person who undertakes to certify in this case, and on whose certificate the court below undertakes to act, is not an officer; the tribunal whom he purports to represent is extra-constitutional, and not judicial; it has not a seal, and is not authorized to have one; its appointees are not even sworn; they act under no legal sanction.

Bouvier's Law Dict., words, *Record: Authentication.* 1 Gr. Ev. sec. 501—505.

But if there could be any doubt on this point, the act of Congress itself settles it. The act does not attempt to authorize the secretary of the commission to certify its decisions, but expressly makes it the duty of the commissioners themselves to do so. The eighth section of the act of 1851 says: "It shall be the *duty of the commissioners* . . . . to decide upon the validity of the said claim, and within thirty days after such decision is rendered, *to certify* the same, with the reasons on which it is founded, to the district attorney," &c.; and the only change which the act of 1852 undertakes to make in this regard is, that the decision, &c., instead of being certified to the local attorney, shall be certified to the attorney general and to the district courts. It was not necessary in the act of 1852 to direct *who* should certify, since that was fully provided in the act of 1851, and no purpose was to be answered by any change in that regard, and no change was attempted. The duties and functions of the secretary of the commission are set forth in section 2 of the act, namely, to act as interpreter to the board, and keep a record of its proceedings; in section 8, to issue subpœnas; and in section 18, to receive certain fees. It is attempted out the phraseology of section 18 to draw, *arguendo*, an attempted authorization for the secretary to certify. The section is as follows:

"That the secretary of the Board shall receive no fee except for furnishing certified copies of any paper or record, and for issuing writs of subpœna. For furnishing certified copies of any paper or record, he shall receive twenty cents for every hundred words, and for issuing writs of subpœna, fifty cents for each witness; which fees shall be equally divided between the said secretary and the assistant clerk."

In the first place, this section only permits the receipt of fees for *furnishing*, not for *making* certified copies. Secondly, it is only for furnishing certified copies of any *paper or record;* not of those proceedings and decisions which are to be the basis of judicial proceedings. Thirdly, it contains no authorization of any sort; but only a mere license to receive fees, and this is given as well to the "assistant clerk" as to the secretary. No inference, therefore, can be drawn from this section that the secretary was intended to be authorized to certify (at least not to certify in a manner that his certificate should be judicially cognizable) to any sort of paper; much less can it be construed to authorize him to exercise a function which another section expressly makes the duty of the commissioners. Moreover, it was not in the power of Congress to confer that function on any one not an officer of the United

States, and who acted without any legal responsibility or sanction in the premises.

I object to Mr. Fisher's certificate, also, because it does not certify to what the statute under which he is supposed to have undertaken to act requires. He does not certify that his roll of MSS. is a "transcript of the proceedings and decision of the commission," and of "the papers and evidence on which the same are founded;" and I hold that he was bound, in a proceeding departing so far from any heretofore known in jurisprudence, to pursue the statute strictly, and, moreover, that the variance in this case is material. It is one thing to certify to "proceedings," and another to certify to "proceedings *and decision;*" one thing to certify to "depositions of witnesses and other documentary evidence *on file in his office,*" and another to certify to "the papers and evidence *on which the proceedings and decision were founded.*" And this variance, material as it is in respect of form—enough so, as appears to me, for the court below to have said, the case is not before us; we are not certified of the matters of which alone the statute authorizes us to take cognizance—the certificate being thus erroneous in form and substance, the record (so to call it) is also erroneous in point of fact. The papers of which it is composed are not those which the statute requires; at least not exclusively so; and this the document itself shows. By reference to pages 4 and 5, it will be seen that various documents are inserted which were not in the case when it was submitted to the Board; two of these documents were admitted by consent, (see p. 5,) but the others, if the record be true, do not and cannot constitute a part of the case, and are erroneously put into the transcript. This is what *appears;* but the fact is, and so the record ought to show, that such of these documents as relate to the case were put in evidence in open session of the board before the submission of the cause; and if they were not "filed," as the secretary terms it, it was his omission, not the counsel's; and, as for the others, if they were put in at all, it was by an ex parte proceeding. Moreover, the opinion of the Board (see Rec. p. 23,) shows that there was at least one document that entered into their consideration of the case, which is not given in the transcript, and it follows that the transcript does not consist in, nor the certificate describe, what the statute requires.

I object to the matter on which the court below undertook to act, that at the time of the "notice" addressed by the attorney general to the clerk of the court, that "the appeal would be prosecuted," *there was no appeal pending*, and there was, consequently, nothing for the notice to act on. The act of 1852 prescribes that the filing of the transcript in the clerk's office shall operate as an appeal; and there is nothing in the record to show when (if at all) this transcript was so filed, but it was certainly not before the 22d July, and for aught we know it may have been long afterwards; whereas, the attorney general's notice was given on the 11th of July; and this "notice" is prescribed by the act to apply to a proceeding already instituted—not to a thing thereafter. If it be said that the date of the notice at Washington is not evidence of the time of filing at San Francisco, and that this filing is the act which the statute refers to, the reply is, that if that be not evidence, there is no evidence of the time in the record; and, moreover, that that date being the only one that appears, and the respective dates of the transcript and the notice the only ones to show when either of them was filed, if we depart from them we have nothing to resort to but conjecture; and jurisdiction cannot be based on conjecture.

But supposing all these proceedings to have been regular and proper, and effective for the purpose of depositing the "appeal" in the clerk's office, and notifying the clerk not to cause it to be dismissed, because it was the intention of the United States to prosecute it; then, the question arises, *how to prosecute it?* Obviously, (if we are to consider the proceeding strictly and technically an "appeal,") the first step in the prosecution of it was by a proper *citation* to the adverse party to come in at a time stated, and defend. One party may *take* an appeal, or (may be supposed for argument's sake) it may stand taken for him by operation of law; but the *prosecution* of it is a different thing; and the act of 1852, in its hardest construction, does not contemplate that the appeal it proposes may be prosecuted in a manner different from the common practice. In the case already cited from 6 How. 81, this court decided that under the act of 1828 for settling land claims in Florida, the filing of a notice in the clerk's office of the court where the cause was tried, of an intention to appeal, constituted an appeal; but this appeal must be *prosecuted* according to the judiciary acts of 1789 and 1803. Because that had not been done, the case was dismissed, as, for a like cause, was that of United States *vs.* Curry, 6 How. 106. In the first of those cases, the court traced, by references in the act of 1828 to prior acts, the manner of prosecuting appeals under it, directly back to the acts of 1789 and 1803. But this does not affect the precedent, since the court decided that they had " no power to receive an appeal in any other manner than that *provided* by law;" and, of course, if there had been no mode thus *provided*, it could not have been received at all. It matters not, therefore, to the present case, whether it be held that appeals under the act of 1852 ought to be prosecuted according to the general law, or to pursue the steps prescribed in the act of 1851 for a *review* of the decisions of the Board, or that there is no mode provided by law for their prosecution. It will probably not be contended that either the court below, or the attorney general, or district attorney, could prescribe the necessary rules; but if they could, they must certainly be governed by analogy and practice, and could not make a rule to disregard all rule. A case in point is presented in the act of 1851, which prescribes a mode for taking appeals from the district courts to this court, but gives no special directions for the manner of prosecuting them. Can this omission be construed into a release of the appellant from all the customary rules for the prosecution of appeals? No one will pretend that it does. His appeal must be in open court, during the same term, or it must be prosecuted by a citation properly signed and returnable. He must bring up to this court at the right time, and in the right manner, an authenticated, and not a private record of the case. He must conform to all the rules with which the prosecution of appeals is invested by the general law and the practice of the courts. This is not left, however, to conjecture or speculation. The case last above quoted (6 How. 106) arose under the Missouri act of 1824, (4 Stat. at Large, 52,) revived and extended to Louisiana by act of 1844, (5 ib. 676,) which provides only that appeals will lie, without specifying the manner of prosecuting them. And this court held that they were subject to the general law in relation to appeals, and must be brought and prosecuted according to the acts of 1789 and 1803; and the case was dismissed because those rules had not been observed. The act of 1852 stops at the same point, in relation to the "appeals" it seems to propose from the commission to the district court; and at the same point we must consequently take up the general law, or else the special act of 1851.

It would seem, taking the two acts (of 1851 and 1852) together, as they undoubtedly ought to be construed together, that it was the act of 1851 that should have been pursued in prosecuting the case after it reached the district court. There is nothing in that proceeding inconsistent with the act of 1852; nor any reason why the ordinary rules of construction should not be observed with reference to the two, (supposing them both to be obligatory,) and the act of 1851 be followed to the point where it becomes incompatible with that of 1852, and resumed where the latter is fulfilled or the incompatibility ceases.

To the question, then, which arises when we find the "appeal" safely instituted, and the clerk notified of the intention of the appellant to prosecute it—to the question, how the prosecution is to be carried on?—the ready answer is: by a petition to the court with a copy served on the appellee, setting forth fully and distinctly, why the claim was alleged not to be valid, and praying the court to review the proceedings of the commission, and decide on the validity of the claim, as the act of 1851 requires, and which the act of 1852 does not, even by implication, pretermit. This interpretation only of the two acts is tolerably consonant with reason, and with the open and fair administration of justice, because it was not only proper that the appellee should be cited to defend, which, under the general law and practice of appeals, is what would be necessary before the appeal could go on, but that, under the circumstances of this case—called an "appeal," but with all the qualities of an original suit—he should have notice of the causes and grounds of the action, to inform him to what points to direct his defence, by additional testimony or otherwise; and because, in this way only (if at all) could the constitutionality of the proceeding be saved.

The attorney general (his brief, p. 6) thinks that the appeal was prosecuted according to the act of 1852; but, plainly, he confounds institution with prosecution; for the act of 1852 gives no directions whatever for the prosecution, only for the institution. The institution of a suit is by filing the declaration or bill; the first step in its prosecution is to issue process, and cause it to be served. The institution of an appeal is the removal of the record; the first step in the prosecution is by a citation to the appellee if he have not already had notice. The notice of the attorney general to the clerk is, that the appeal will be prosecuted; hence that it is not to be held dismissed; the notice is, that it *will be* prosecuted. Now, I contend that the first step for a legal prosecution should have been by citation to the appellee, with notice of the time and term to which it would be prosecuted.

2. As to time:

The act of 1852 does not, perhaps, prescribe expressly any limitation of time for some of the acts which it directs to be performed; but it does not, for that reason, I suppose, intend to abandon the idea of time, and deliver the California cases over to indefinite litigation. Yet such is the practical construction given to it in the court below, and such is its necessary interpretation unless we find some limit in its relation to the act of 1851, or in the general law.

The act of 1851 gives thirty days to the party against whom the decision of the commissioners may be rendered, to inform himself of the fact; sixty more to determine his mind whether to prosecute the case further, and ninety more to commence the proceeding—six months in all. The act of 1852 provides that two certified transcripts, &c., shall be prepared, one of them filed with the clerk of the court, and the other sent to the attorney general—that filed with the clerk to operate as an appeal. Now, the preparation of these transcripts, and the filing of the one and transmitting of the other, were intended to be simultaneous acts, or the filing was intended to precede, as it does precede in the injunctions of the statute, the sending to the attorney general; and this for an obvious reason, that otherwise would be apt to happen, as has happened in this case, that the attorney general should determine to prosecute the appeal, and so give notice, when in fact there was no appeal pending, and his notice had nothing to operate on. If this were not the case, let us see how the parties would be placed. Cervantes, we will say, gets a "final decision" (these being the words of the act) on the 18th December, 1852; a transcript is prepared by the 1st January, 1853, and sent to the attorney general, who receives it, say on the 1st February; within six months from that time he must have caused to be filed in the clerk's office in California his notice to prosecute the appeal, or it will be dismissed; but within that six months there is no transcript filed, and consequently no appeal pending. Suppose he send no notice, the clerk cannot cause the appeal to be dismissed, because there is no appeal there; yet, according to the practice adopted in the court below, one might be instituted the following day. Would the attorney general have then another six months? Obviously not, because his notice to prosecute must be within six months from the time *he received* the transcript; yet there is an appeal there, and no known way for getting it off, or pushing it forward. But suppose he send a notice of intent to prosecute; he cannot prosecute what is not begun, and though it be begun immediately after, his time having already expired, the appeal cannot be saved from dismissal as soon as it be ascertained that the attorney general has had, during six months, his copy of the papers, and has not directed that it—*it*, the pending appeal—be prosecuted. On the other hand, the private claimant, if the case have gone against him before the commission, is liable to the misfortune that his time for giving notice to prosecute the appeal shall expire before it begins, and his appeal be dismissed before it is instituted. Thus, the act requires, that if the decision be against the private claimant, he shall file a notice of his intention to prosecute the appeal within six months from the time of the decision; so that, if the time for filing the transcript, which operates the appeal, be unlimited, it may happen (as up to this time has, in every case, happened) that the filing will not take place till after the six months (and consequently his probation) has elapsed. Or if that be not the true interpretation of the act, (and it is not the interpretation which Mr. Secretary Fisher seems to have given it,) and the meaning of it be that he shall have six months after the filing of the transcript with the clerk to make up his mind whether he will cite the adverse party, and prosecute his appeal; then this will happen, namely, that the time accorded to him may commence after that of the attorney general has ended. Such absurdities and incongruities were never intended. It was intended that the appeal should be *commenced*—should be instituted—within the same period of six months that is allowed, in the act of 1851, for filing the petition which under that act was the mode of commencing. This appeal was not so commenced, since the record shows that the last act the commission assumed to perform was on the 18th of December, 1852. I contend that the last act the commissioners had power to perform in the premises was performed on the 3d of August, 1852, when they decided "on the validity of the claim;" but the last act they assume to have performed was on the 18th December, 1852, and that was more than *seven months* prior to the shortest date that can be assigned for the institution of the appeal. The inverse order in which the commission or the secretary undertook to carry out the provisions of the act of 1852, has resulted, then, as it seems to me, fatally to the jurisdiction of the court below in this case, not only in inducing the notice of the attorney general to prosecute the appeal, when there was no appeal in esse, but also in suffering the time within which the appeal could be instituted to elapse.

If we do not adopt this construction of the act of 1852, the matter is involved in insuperable absurdities, and the policy and intention of Congress to promote a speedy settlement of these cases defeated. The whole business is left to the discretion or convenience of the secretary of the commission, not even an officer of the government, nor acting under the sanction of an oath. It cannot be doubted, that it was the intent of the act of 1852 to place the United States and the private claimant on the same basis with respect to the right of appeal, with this single difference, that the private claimant against whom the decision was rendered should be supposed to be informed of the fact and of the institution of the appeal, from the moment of the filing of the transcript with the clerk, while the United States reserved the additional time that was necessary to communicate the fact to their agent here, the attorney general; as it is also the intent that the appeal which the filing of the transcript operates to install, is that to which the attorney general's notice (or the notice of the claimant, as the case may be) shall apply; and it is only by the construction for which I contend that these intendments can be saved, or the rights of either the United States or the claimant.

But, if it were the intention of Congress to involve these cases in this web of contradictions, I contend that, at least, it was not in its power to extend the time, on behalf of the United States, for taking appeals beyond the positive stipulations of the act of 1851. I propose to argue this point more fully hereafter, and only now call attention to the particular phraseology of the 12th section of the act of 1851, that "*to entitle* either party to a review," &c., the proceeding must be absolutely commenced within six months. Whether or not the other provisions of that section might have been superseded, this one at least involves a substantial right which Congress could not (and I contend has not attempted to) take away. If they were not "entitled" under the first act, they could not make themselves so by their own volition merely. I heard it intimated in California, that the restriction of the act of 1851 applied only to bills of review; and although it was true, that the United States had bargained that they would not bring a bill of review unless within six months, they had not bargained not to take an appeal; that is, that they could escape their stipulations by a trick and a change of name. But, in the first place, such an imputation on the good faith of Congress is to be scorned; and in the second place, though *a review* may not technically be *an appeal*, yet, to all intents, an appeal is a review, and it is against the right of review, unless within six months, that the act provides. This provision, moreover, even if Congress had power to repeal it, has not been repealed. There is nothing in the act of 1852 repealing it in terms, nor irreconcilable with it.

Again, this appeal, if brought in time, has not been *prosecuted* in time. In the cases above quoted (6 How. 81; ib. 106,) the court decided, as we have already seen, that where appeals were authorized in general terms, they were subject to the rules laid down in the acts of 1789 and 1803; and, among the rest, it was held that the appeal must be prosecuted to the *term of the appellate court next following*. Now this appeal was not so prosecuted. The next term of the appellate court, after the institution of this appeal, was held (9 Stat. at Lar. 522) at Sacramento, on the first Monday of September, and the next following that, at Stockton, on the second Monday of October; and this appeal was not prosecuted to either of them, but, if it can properly be said to have been prosecuted at all, then to a special (and unauthorized) term at San Francisco, after the lapse of two regular terms; it was not, therefore, prosecuted in the time required by law.

3. As to manner and time, considered together:

I object to the manner and time of proceeding in the court below, that the act of 1852, under which it assumes to have been brought, was not applicable to this case. The act relates to decisions which "shall be," not to those which have been, rendered; and the record shows (p. 5) that the decision of the commissioners in this case was given on the 3d of August, 1852, twenty-two days before the act of 1852 was proposed in Congress, and twenty-eight days before it was enacted. On the delivery of that decision the functions of the commission were fulfilled, their discretion exhausted; and the claim, as far as their action could accomplish it, stood confirmed. The 8th section of the act of 1851 prescribes their entire office in this regard, and that is, where the case is ready for hearing, to proceed promptly to examine it, and decide "*on the validity of the claim.*" That is precisely what was done in this case on the 3d of August, 1852. The claim was filed in February, and after testimony on the part of the claimant and on the part of the United States, it was set for hearing, argued elaborately, taken under advisement by the Board on the 16th of June, examined, and finally, on the said 3d August, its "validity" decided on, and it declared to be valid. What more had the commissioners to do, in which the claimant was concerned, except the merely ministerial duty of furnishing him (as intended in section 13) with an authentic certificate of the confirmation? Nothing; emphatically nothing. They had another duty to perform for the United States: namely, to certify their decision to the district attorney; but that was also ministerial, and, performed or neglected, could not affect the rights of the claimant. As for the additional sentence which the secretary—or the commission, I care not which—tacks to the entry of the fact of the delivery of the "opinion of the Board, declaring the claim valid," namely, that "the entering of a final decree of confirmation is reserved for a future day;" it is of no more purport than if they had said the issuing of *a patent* was reserved for a future day, unless they supposed that they had another duty to perform, when their decision should have ripened by the omission to give notice for a further prosecution of the case. This is the only presumption on which there is any meaning in the sentence; for, without that, the office of the commission in regard to the claim was discharged: they had decided on the validity of the claim, and there is not a syllable in the act that authorizes them to decide on anything else in relation to it, or that refers to a final confirmation, except in reference to the confirmations by the highest tribunal, or those of the lower ones which had ripened by the time elapsing in which they might have been further prosecuted. If that were the meaning of the commissioners, they mistook the intent of the act; if that was not their meaning, then the sentence had no signification; and, in either case, it was mere surplusage.

The decision given on the 3d of August was that "*of the board.*" That is shown at page 5, in the journal of that day's proceedings, and at page 7, where the order is made for recording the opinion on the journal. It is also so denominated by Mr. Commissioner Hall, in his subsequent separate opinion, and by Mr. Commissioner Thornton in his supplemental "final opinion or reason of decision." I do not question the right of those gentlemen to have given (or now to give) any additional *reasons* for the opinion and decision they had rendered; but that they could by any such means lessen the effect, or retard the operation of the decision itself, was, I think, a very mistaken opinion, if it was entertained. That it was (subsequently) entertained, I admit there is reason to believe, from the language of the papers delivered by the commissioners in the following December; as, for instance, Mr. Hall's concluding sentence, that he "concurs" (speaking in the present tense) "in the confirmation of the claim without a preliminary survey." But that signifies nothing; because, for any pertinency a preliminary survey would have to the decision, he might as well have said he consented to the confirmation of the claim, without a preliminary translation of it into high Dutch. Or, if he meant to intimate that it was only *then* that he "concurred," it only follows that the decision delivered in August was the work of his two associates, because in his first sentence he speaks of it as "the opinion of the Board;" and the concurrence of two (i. e. of a majority) of the commissioners was necessary to give it that character. Mr. Hall's subsequent concurrence was very acceptable, but as it could give no additional validity to the decision, so neither can I understand how it could have any effect to impair it. As to the suggestion of Mr. Hall, (Rec. p. 44,) that at the time of the decision (on the 3d of August) there was a bill pending before Congress to change the law in respect of the officer to whom the decisions of the commissioners were to be certified, that was a mere slip of memory, since there was not any such bill pending at that time, nor any proposition of the sort mooted in Congress till the 25th of August, and it was not known of in California until the latter part of September. So, also, Mr. Thornton discovers in December that there was one point which the "opinion of the Board" that had been "pronounced and filed" in August had forgotten to discuss, and which, from a casual reading, would seem in his opinion sufficient to re-open the case. But if we examine this "opinion of the Board," we shall find that it takes precisely the same view of the powers of the Board as that I have already presented, and that the commissioners intended, and did, in that decision perform their entire functions in the premises.

"The 8th section," says this opinion of the Board, "declares *fully* the subject matter on which we are to decide; that is, *the validity of any right or title* derived from the source mentioned; it declares *the evidence* on which *alone* that decision was to be rendered, being that introduced by the claimant on the one side and the United States on the other." Having thus shown that, in the "opinion of the Board," the validity of the claim was all that the Board could decide on, and that it must make this decision on the testimony which the parties should voluntarily introduce, and could not postpone it for a "preliminary survey," or any other testimony the parties did not choose to offer, the Board go on, in view of "the grounds on which the Board is required to act, both as to evidence and law," to "consider whether the claim of the present claimant is valid or not," and finally, "*from a full view of the whole case*," the claim is declared "valid." After which, I think, it was too late for Mr. Thornton and Mr. Hall, separately or unitedly, four months afterward to attempt to invalidate the action of the Board, on the ground of an omitted point, or for any other cause. The decision was rendered—it could not be taken away; certainly not without a re-opening of the case, on a proper showing, and in due form, and with notice to the claimant.

I insist on this construction of the act, and of the duties and functions of the commissioners. Whether we regard them as officers of the United States, or as a judicial tribunal, or (which is their true position) as a board of arbitrators, their powers were alike limited to the precise points specified in the act. As officers, the commission could decide nothing that was not positively given it by statute to decide, so as a judicial tribunal it could not go beyond its jurisdiction, and as arbitrators could only make an award on the precise matter mutually submitted; and this once done, in either capacity, the commission was, *quoad* that matter, *functus officio*. As for the assumption in Mr. Commissioner Thornton's opinion of December, that the Board, in its "full view of the whole case," had omitted the important question of "*quantity*," if it were intended to raise an excuse for disturbing the original decision, it only presents those after-thought proceedings in a still more obnoxious point of view. Cervantes had claimed but two leagues; or rather he had claimed less than that, for the boundaries by which he claimed do not contain so much, as is shown by the juridical measurement. But, whatever he did claim, the commission had decided that he claimed with a valid title. Now, by their subsequent speculations on the subject of "quantity," did they purpose to *reduce* the limits of this valid claim, or to enlarge it, or neither? To reduce or enlarge was alike beyond their power; they could not subtract from what they had already decided to be valid, and was now beyond their control, and to attempt it would be odious; they could not add to what was already confirmed, because the confirmation covered all that was embraced in the claim, and the claim was all they were empowered to act on. To do neither, therefore; neither to reduce nor enlarge; not to affect the matter at all, was all they could do; and, I respectfully submit, all that they did.

I stand, therefore, on that decision of the 3d August. I plead it as a full discharge by the commissioners of their functions and duties in respect of the decision of the claim of Cervantes; as their full judgment on the case presented to their discretion, as the full award of the referees on the question submitted. I insist on it as a "fixed fact;" and a fact so well fixed that there exists none that this well chosen phrase of Mr. Attorney General would better apply to. It was a verdict given, a judgment rendered, a decree entered, and which it was no more competent for the commissioners than for any other three men to disturb, or lessen the force of.

Even Mr. Commissioner Thornton's opinion of December informs us that the opinion delivered in August was a decision of the case. He says that "the Board has already, by an opinion pronounced and *filed* on the 3d August, DECIDED on all the questions," &c. That opinion, then, was *a decision;* and though Mr. Commissioner seems to be under the impression that it did not decide "quantity," yet, having once ascertained that it is *a decision,* we can go to its own text to ascertain what it decides. It decides, then, the validity of *the claim,* and the claim (no discrimination being made in the decision) carries with it the "quantity," the extent and limits, embraced in the claim. Quantity was therefore considered in the first decision and also decided; and the case being decided, there was no more power to diminish it in respect of quantity than to modify it in any other respect, or to revoke it; a diminution being, in fact, to that extent, a revocation.

The matter is capable, however, of being presented in a different and better aspect. The opinion of the Board goes to and decides the subject matter which the act of Congress authorizes the commission to decide, namely, *the validity of the claim ;* and those subsequent acts in December all look to something else, namely, a "decree of final confirmation." As we have seen, the statute speaks of "final confirmations" and "final decrees," in a particular sense, and different from the sense in which the decisions of the commissioners, when first made, are to be regarded. The 13th section provides that for "all claims finally confirmed by the commissioners, or by the district or supreme courts," a patent shall issue; and makes it the duty of the surveyor general to cause all lands which shall be "finally confirmed" to be surveyed ; and section 15 provides that "the final decrees rendered by the commissioners, or by the district or supreme court, shall be conclusive," &c.; in each instance plainly referring to those decisions which had been made final by the approbation of the supreme court, or become so by lapse of time, and the non-intervention of any proceeding to carry them into the courts. It would, therefore, be supposing in those commissioners a very indifferent knowledge of the force of language, and of the rules concerning special statutes and special tribunals, which are to be held to their strict lines, to attribute to them any other purpose, in those "final" acts of December, than to issue that final decree, which the 13th and 15th sections of the statute speak of, and which they seem to have supposed necessary after their first decision had matured by the lapse of ninety days without notice on their journals of an intention to petition for a review of it. I do not think this last action was necessary, but that the ripening of the original decision made *it* final in the sense of the statute; but if they thought differently they were right to act on their belief, and there is this, at least, to say for it, that it is only a work of supererogation.

But it matters not what their opinions or intentions were. They had no *power* to lessen the effect of their decision in Cervantes's favor;

their decision that his claim was valid stands unaffected by their subsequent acts, whatever force those may have in themselves; and it was of that decision alone that a review could be had before the district court, and that decision having been rendered prior to the act of 1852, that act does not embrace it.

We shall be told, however, that it is precisely for "final decrees" that the appeals of the act of 1852 are provided. Now the use of this word "final" in the act of 1852 is only another proof of the inadvertence and misapprehension with which the act was drawn. If we are to understand the word in the same sense that it is used in the act of 1851, as by the ordinary rule of construction we are bound to consider it, then the provision is certainly nugatory, for an appeal cannot lie from a decree which is final in that sense; it would be as lawful to direct that an appeal should lie from the patent. If, however, we are to understand the word in the sense in which it is used, for example, in the judiciary acts, then the decision rendered on the 3d of August is precisely the kind of decision which the act of 1852 intends, but that decision cannot come within its provisions, since they are prospective.

III. The court below could not have appellate jurisdiction in the premises.

1. The commission established by virtue of the act of 1851 is not a court under the Constitution, and consequently is not the depository of any portion of judicial power. 2. The act was not passed in virtue of any legislative authority, express or implied, possessed by Congress, and, consequently, it does not rank as *a law*.

The first of these propositions is maintained by frequent decisions of this court, and is too plain to need argument. Mr. Justice Story puts the whole doctrine in a single sentence: "By the Constitution of the United States all civil and criminal jurisdiction must be exclusively confided to judges holding their office during good behaviour; and though Congress may from time to time distribute the jurisdiction among such inferior courts as it may create from time to time, and withdraw it at their pleasure, it is not competent for them to confer it upon *temporary judges* or *confide it by special commission*." 3 Story's Com., sec. 1621. In the *territories* only of the United States—that is, in those districts where the joint powers of the Federal and of a State government are exercised by Congress—has it ever been pretended that Congress could establish courts of other terms of office, or with other jurisdiction, than are prescribed in art. iii, sec. 2, of the Constitution; and this authority (resting on a basis entirely different from those grants of power which enable Congress to provide for the organization of the federal courts) is lost the moment that a State government supervenes. 1 Pet. 511, 546; 9 How. 243, 244; and 13 Ohio Rep. 48, Logan Bank, &c.

The commission, then, is not a court under the Constitution—is not a part of the judiciary. The second proposition, namely, that the act under which the commission was organized was not enacted by Congress in pursuance of any grant of *legislative* power, and consequently (as well as for other reasons) does not rank as *a law*, though perhaps not hitherto in terms decided, seems to me equally clear, and to follow from the other; for since it was not enacted under those clauses which authorize the creation of the judiciary, to what possible portion of legislative power can we refer it? It is not to be found in the cases enumerated in sec. 8, art. i., and it is not a measure necessary to carry into execution any of the other powers conferred in the Constitution.

Among the powers of Congress, however, is that of disposing of and making rules and regulations concerning *the territory* (i. e. the land) and other *property* of the United States. But this clause does not give power to legislate in the manner of the acts under consideration, because, first, the general authority to pass laws necessary to carry into effect given powers cannot be construed into authority to disregard specific limitations; that is, under pretence of enacting a law necessary to carry into effect some other power, Congress cannot enlarge its power in respect of the formation of a judiciary, and create another class of tribunals than that prescribed, nor do away with the provision which makes causes to which the United States are a party, cognizable (in the States) only in those constitutional courts; secondly, the management of property is not a legislative but an administrative function; and third, it would be assuming the precise matter in issue, namely, whether this land be the property of the United States, if Congress could legislate on it as such. Congress had not, therefore, by virtue of any grant of legislative power, authority to establish those acts.

Those acts, moreover, are not *laws* for other not less cogent reasons: 1. Controversies respecting the ownership of property must be settled by the laws as they are, and cannot be made the subject of special legislation, or turned over to special, partial jurisdictions: the Constitution protects the American people from this injustice and calamity, and especially in cases to which the United States are a party. (Art. iii., § 1, 2; amendments, arts. v. and vii.; 2 Kent's Com. 10, tit. 24; 3 Story's Com. § 1783–4.) 2. It is not a rule of conduct; not obligatory on any one who does not voluntarily submit to it; it has no inherent force; commands obedience from no one; in all which it fails of any resemblance to a law. 3. It goes so far (§ 11) as to prescribe *rules of decision* for the settlement of questions of right; which would be clearly an assumption of judicial authority, and out of the power of Congress, if attempted legislatively. 4. It declares that all lands to which the claims are not presented within two years from the date of the act shall be deemed to be lands of the United States; an enactment which, if made legislatively, would be equivalent to an act of forfeiture, and obviously beyond the legislative powers of the United States.

But I do not, therefore, question the competency of Congress to pass the act of 1851, or rather to bind the United States by its provisions. I trace the power to two sources: First, to that authority which Congress has over the property of the United States, and consequently over their claims to property and the adjustment of them. Second, to the immunity possessed by the United States from judicial process, and their consequent power to prescribe the manner and terms on which they will consent to be brought into a litigation. But neither of these sources is legislative; because the power under them is not governmental, but that of an agent; and consequently binds only the party for whom (i. e. by whose agent) the act is adopted.

Every people, in its organized capacity, has two characters; one public, one private. In its public capacity, the State can give laws; but in its private capacity, it must obey them; and it cannot abuse the powers which it has in its public capacity, so as to prescribe laws to suit particular cases in which it is interested in its private capacity. In its public capacity its powers are according to the constitution of government which it may have adopted; in its private capacity it is as a person, or corporation aggregate, and has the same powers and rights as a natural person, and is subject to the same obligations. (Vattel, Prelim. ch. , § 2, 5; Ib. ch. iv., § 40, 48, 49; Ib. ch. xiii., § 164, 166; 1 Dal. 44; 15 Pet., 392; 11 How. 231.) In their private capacity, then, i. e. as a body politic, or artificial person, the United States is capable of making contracts and holding property; and in that capacity it owns property, or claims to own property, in the State of California; and as such owner or claimant it has the same rights as a natural person to settle its claims by arbitration, by a reference, by an amicable suit, or by litigation according to law. "The restraints of the Constitution," as this court say, in the case last cited, (11 How. 231,) "on their sovereign powers, do not affect their civil rights." Hence, in virtue of these their civil rights, the United States, through Congress, their agent, could make such proposal as it saw proper to Cruz Cervantes and other landholders in California, for the adjustment of their respective claims. And this is precisely what they did, in the act of 1851; but not *legislatively;* on the contrary, in obedience and subject to the law, which recognises such a right in every owner or claimant of property. It was not the exercise of any higher power than if, instead of proposing to the counter claimant a proceeding before this commission, it had directed actions at law to be brought in each case. This was in the option of Congress. But, it will not be contested, had they adopted that alternative, that the suits must have been brought in the federal courts, and could not have been brought before this special tribunal, and must have been adjudicated by the law as it is, and not by any law that might have been attempted to be made for the occasion.

The United States acted, then, in their private capacity in adopting the act of 1851; and established a private tribunal, an arbitration, and not a public tribunal or court. The power of Congress over the property of the United States carried with it the power to adjust, on the part of the United States, all their claims to property; and this is the manner of adjustment they chose, and offered to the acceptance of the counter claimants. This is not a new doctrine. In the debates in the Senate, on this act, Mr. Ewing, of Ohio, repeatedly advanced this idea: "We do not act here (he says) as legislators; we act as a *great landed pro-*

prietor;" "we make *a proposition* to individuals who claim," &c. "If an individual holds a title under the Spanish or Mexican government, and does not see fit to come before the commissioners, he still retains that title to the land. But we *propose* to give him an opportunity to come before the commissioners and adjust his title in a mode which shall be easier, cheaper and better for him than to do it *in a court of justice;* such is the object and effect of the bill." (Cong. Globe, xviii., 361.) Again, "The bill is consistent. It is the proposition of a great landholder." "It is a proposition on the part of the United States to receive and investigate the claims of individuals to lands, and confirm those which are good, and put them out of controversy." "Now if we look at this question in that point of light, and consider the United States as a great landholder, and these individuals as claiming lands not secured from the public domain, and if we consider this bill as a mere proposition that will provide a tribunal before whom every one may present his claim," &c., "it relieves the subject of every difficulty." (Ib.)

Mr. Ewing was right; that view removes the difficulty of the case, and no other view would remove it. In no other view would the act stand the constitutional test a moment, since in no particular is it warranted by the grants of legislative power given in the constitution, and (as we have seen) in several particulars it contravenes them.

The term *laws* seems to me to be entirely a misnomer when applied to this class of acts of Congress, of which there are many on the statute books. If we suppose the management and disposal of the property of the United States to have been confided to the President instead of to Congress, as might have been the case without any departure from the general plan of the government, we should never think of denominating as laws the measures which he should adopt in relation to them, or for the adjustment of disputes concerning them. We should know them for what they are—administrative measures; the execution of (not a legislative, but an administrative) trust; not laws in any other sense than the measures which any private landholder may choose to adopt for the management of his estate, or the adjustment of disputes concerning it, are laws. So, if the residuary interest of Mexico in California had been purchased by an individual, it cannot be doubted that it would have been competent to such purchaser to have made to the prior grantees of his grantor precisely the proposal which the act of 1851 contains for the adjustment of the same questions; but we should not denominate such an act of a private person a law; yet it would be a law in the same sense that the act of 1851 is a law, namely, a law to the maker of it, when accepted by the other party, and so become a contract. The ordinary functions of Congress, however, are legislative; its acts are in the form of laws, and hence in familiar phraseology they are all so called; even the acts for admitting new States are so called, but improperly, because if that function (directly given as it is to Congress) were a legislative function, States might be put out of the Union by the repeal of the act which brought them in. Hence, though all the legislative power that is granted in the Constitution is vested in Congress, yet, we see that Congress has functions that are not legislative; from which, when once exercised, it cannot retreat, more than an individual from his bond fairly given for a consideration.

The attorney general (Brief, p. 17) thinks the United States "hold the public domain in their public capacity as a government, and no otherwise." But this court has thought, in the case just quoted in 11 How., that they had civil rights as well as political powers, and that their civil rights were not (though their political powers are) limited by the restrictions of the Constitution, and that their civil rights are those which attach to their property.

Going now, however, only on the ground that the commission is not a court under the constitution, and hence is not the depository of any portion of the judicial power of the United States, and hence is not, in any legal sense, a judicial tribunal—propositions which, I had supposed, till seeing the attorney general's brief, would not be denied—could Congress impart to the federal judiciary an appellate jurisdiction from its decisions?

The judge of the court below, in reply to suggestions of the counsel of Cervantes, intimated (and very much to my surprise the attorney general assumes the same ground) from the bench, that he thought such jurisdiction might be conferred on the same principle as appellate jurisdiction is given to this honorable court, in certain cases, from the highest judicial tribunals of the States. I am not able to discover the analogy; and I think a short sentence will suffice for the suggestion: Appellate jurisdiction will only lie from one judicial tribunal to another, and the commissioners have never been made a judicial tribunal: No State legislature has made it so; and Congress cannot. Again, the appellate jurisdiction exercised in certain cases by this court, from the courts of the States, is given to fulfil the Constitution, and to secure constitutional rights that could not otherwise be saved; since, of many of the cases to which the Constitution provides that the judicial power of the United States shall extend, the State courts have also jurisdiction which would oust that of the federal courts, if provision were not made for their removal or appeal. (Federalist, Letter LXXXII; 6 Wh. 419; 1 ib. 339, 350.) The laws, therefore, which provide for such removals and appeals are necessary and proper for carrying into execution a power positively vested. Can any such thing be predicated of the assumed jurisdiction of the court below in this case? The only pretence for it was, that the United States were a party to the case. But the case nevertheless was not in the constitutional purview. A case to which the United States are a party could not arise, according to the Constitution, before that commission; it could arise nowhere but in the federal courts; not even in the State courts. It was not a *case* in the constitutional, juridical sense. A case, in that sense, is a suit in law or equity, instituted according to the *regular course of judicial proceedings*. (3 Sto. Com. § 1640; 6 Wh. 408.) I am aware that "cases" is not the word used in this connection in the Constitution. The phrase is, that the judicial power therein authorized shall extend to "*controversies* to which the States are a party." But the word controversies is well understood to be here used to confine the power conferred to civil causes; the word "cases" used in the previous parts of the clause including criminal causes also. (1 Tucker's Bl. Com. App. 420, '21; 2 Dal. 419, 431, 432, cited in 3 Sto. Com. § 1668.) But whether they be cases, or controversies, it is *judicial power* which is extended to them, and they must consequently be controversies of a *judicial character*, (since it is only to judicial controversies that judicial power extends,) and must judicially arise, before they can become judicially appellate. The author of No. LXXXII. of the Federalist, cited in 6 Wh. 419, regards the national and State system of judicature as "ONE WHOLE." The doctrine of the honorable judge of the court below would take into the plan all private tribunals, as well—referees, arbitrators, umpires of all classes. This, however, cannot be sustained, on general principles, by any precedent to be found in the history of jurisprudence, and certainly not under the restricted functions of the courts of the United States. Suppose, before such a commission as that established by the act of 1851, a citizen of California and a citizen of New York, for example, have an arbitration of a dispute between them: could an act of Congress constitute one of the federal courts a court of appeals from that award? This will not be pretended; yet the federal courts have jurisdiction of "controversies between citizens of different States;" quite as amply as of controversies to which the United States are a party. "Jurisdiction," or "judicial power," means cognizance of a cause—or "controversy"—brought before a court, according to the recognised forms of jurisprudence; and "appellate jurisdiction" means the power in the court which possesses it to revise the proceedings and decision of some other court. (3 Sto. § 1601–1621.)

Again, the United States could not have commenced a judicial proceeding, nor authorize the commencement of a judicial proceeding, before a commission; because the United States can neither commence nor authorize a judicial proceeding, except under the authority and on the basis of the Constitution. The United States cannot confer any judicial power except in that manner. The judicial power possessed by the States, and from which in certain cases a removal or an appeal may be had to the federal courts, is a consequence of such power in the States prior to the Constitution. This did not embrace controversies to which the United States were a party; because previous to that time no such controversies, in the constitutional sense, existed. Consequently, the only authority existing, by which provision can be made for a judicial cognizance of such controversies, is the authority contained in the Constitution. Consequently, no such controversy can have a judicial existence or cognizance except before courts exercising the judicial power of the United States, organized by law according to the Constitution. Consequently the matter before the commission could not be such a case; and consequently the court below could not take cognizance of it.

The act of 1851 was drawn by a lawyer; and, whatever opinions there may be touching its justice and expediency, it was capable of being carried lawfully into execution. It did not propose any such anomaly as an appellate jurisdiction in the federal courts from the decision of the commissioners. It did not indeed propose that the decisions of the commissioners should be on their rendering final. It reserved the right on the part of the United States, and in return gave the necessary permission to the claimant who should submit himself to the terms of the act, to bring an action by petition, and in regular form of law, in the proper district court, with an appeal from the judgment of that court, in the case thus constitutionally existing, to this court. The proceeding before the commission was necessarily by consent, as are all submissions to tribunals other than courts, properly so called, and capable of issuing compulsory process. The proceeding, then, begun by consent; it was not competent to either party, of his own volition, to take it out of that category; but it must go on in the manner that the original consent prescribed.

The problem admits of a brief solution. There are but two ways in which the United States can become a party to a judicial controversy, to wit, either by bringing an action against another, or by consenting that another may bring an action against them; and there is but one description of courts in which the action in either case can be brought, namely, the courts of the United States, established under the Constitution. It follows, that as a case to which the United States are a party cannot arise in any other description of courts, so there cannot be any appellate cause to which they are a party that did not so arise. A case to which the United States are a party cannot have an existence in any other than the federal courts; and one cannot carry on either by appeal, or otherwise, what has no existence.

But suppose it were otherwise. Suppose, in virtue of the immunity of the United States from judicial process, and the consequent ability of Congress to prescribe terms and conditions on consenting that the United States might be sued, it had been competent to Congress to make the commissioners a judicial tribunal, with appellate jurisdiction thence to the district and supreme courts. Yet they have not done so: they have not attempted to make a court of the commission; have given it none of the characteristics of a court; it has no clerk (in the judicial sense;) it has no seal; it can issue no process, except subpœnas to witnesses, and those not compulsory; the officer who attends to the interests of the United States before it is not even called an attorney, but an agent; the proceedings are not conducted according to the forms of courts of justice. By an arbitrary rule of the Board, the claimant was compelled to file a petition; but the act did not require, nor contemplate it, (13 H. 49,) nor was there any answer required, or made. It is manifest, therefore, that the power given to the commission, though in some respects judicial in its character, because judgment and discretion must be exercised by them, was not conferred as a judicial function, to be exercised in the ordinary forms of a court of justice, but as the power ordinarily given to a commission to adjust claims. (13 How. 46, 48.)

Congress, however, could not, if it would, make the commissioners a judicial tribunal. They could prescribe terms, certainly, to Cervantes, before and on which only they would allow him to bring the United States into court, but they could not prescribe terms which would enlarge their own constitutional powers. They could (and did) exact of him, that before he could have the privilege of judicial process against the United States, he should first submit his case to a commission or arbitration of their appointing; this is what, in the plenitude (not of their authority, but) of their immunity, they could and did exact of him; but they could not, by any acquiescence of his, either forced or voluntary, make that commission or arbitration into a judicial tribunal, or endow it with judicial functions, because that is a matter determined by their constitutional grant of authority, to which neither the assent nor the refusal of Cervantes, nor of all the land claimants in California, nor any act of theirs, or agreement or arrangement with others, could add anything. Congress, then, did not attempt to make the commission a judicial body; if they had attempted it, they could not do it, and consequently could not make a judicial appeal lie from it.

The Senator who drafted the act of 1851 was well aware of all these facts; and that, though by consent, the land claimants in California and the United States might submit the question of their respective rights to a special commission, yet the proceedings of that commission could not make a case for the federal courts; and the only way of saving the right of a judicial hearing of the cause to the party that should be dissatisfied with the decision of the commission, was by a provision for commencing an action there, and so creating *a case* in the judicial, constitutional sense.

It is historically the fact, as I have always understood, of the act of 1851, that the interposition of the district courts was only provided as a matter of necessity; that could it have been so arranged, the cases would have come directly to this court from the commission, and so saved the delay and expense of the passage through the district courts. But it was well understood that appellate jurisdiction would not lie from the commission to a court; and these were not a class of cases of which original jurisdiction could be conferred on this court. Hence, it was necessary to provide for jurisdiction in the district courts, to create a cause there which could come by appeal here.

As for the suggestions and citations which the attorney general makes to show that there are certain transactions of the Government officers, which by law may create controversies for the courts, if they show any thing pertinent to his argument, it is equivalent to saying that any two persons who have a dispute which one of them takes into court, are a judicial tribunal, since they have made a case for judicial cognizance; and that the jurisdiction of causes heretofore called original, is in fact appellate, since the parties between whom the controversy arises "appeal" to it. In all those cases that he cites from the statutes, the actions contemplated are by original process; and that this is competent nobody disputes; and the cases prove the reverse of what the attorney general seems to suppose.

As for the suggestion that Congress might confer authority on the courts to issue writs of mandamus to the public officers, &c., undoubtedly that is true; and I only regret it has not exercised that power. If it had, I can assure the attorney general this case would have been here long before this time, and in another shape; for nothing would have given me more satisfaction than to have applied more than eighteen months ago for a mandamus on the commissioners to give me my certificate, and on the surveyor general for my survey. But this court have decided that to give such power was conferring original, and not appellate jurisdiction, and hence could not be conferred by Congress on this court. Marbury's case, 1 Cr.

To our position, pertinent to this point, that the judiciary is not in any sense a part of the State, when it comes to judge between the State and an individual; the State, in fact, not appearing before the judiciary in its political, but in its private capacity—the attorney general replies:

"The State appears in fact as what it is in fact, that is as the State."

I admit the smartness of the saying. It has nearly as much pith, and conveys quite as pointedly to the mind the idea of a vigorous, active, concentrated, and consolidated despotism, as another not unlike saying, attributed to Louis XIV: *L'Etat? c'est moi!* THE STATE? THAT IS I! The saying of a monarch who is reputed, along with his minister, Colbert, to have had many dexterous ways of transferring the property of his subjects into his own coffers, but, as far as is related of him, maintained an independent judiciary, and never undertook to interfere with pending lawsuits; consequently was not so free in his notions of what the power of the State consists in, as our republican rulers who assume the same style.

And notwithstanding the raciness of the attorney general's rejoinder, the position is nevertheless true; the State comes before the judiciary not as the law-giver, which is its State or public capacity, but as the law-obeyer, which is its private capacity.

In 3 Vesey, 429, cited with approbation in 12 Pet. 738, 743, the doctrine is clearly laid down, as well as the boundaries of political and judicial functions.

But if it be also true, as I think I have shown, that the act of 1851 was not adopted in pursuance of any grant of legislative power, then it follows that the act of 1852 is in the same category, and consequently conveys no pretence of authority for changing the mode of proceeding prescribed in the act of 1851, nor for the court below to take appellate jurisdiction.

The act of 1852 is, moreover, unconstitutional and incompetent to Congress, in several particulars, in whatever capacity attempted to be enacted. The constitutional provision is, that the judicial power shall extend "to controversies to which the United States shall be *a party*." Now, does not the very condition of being *a party* to a judicial controversy imply equality of condition with the other party; and can *a party* to a litigation, though that party be the United States—or the United States more than any other party—*legislate* on the subject matter, and change the position of the cause pending its decision? This would be incompatible with the condition of "*a party*," and inconsistent with that impartial justice which the Constitution intends to secure. The United States claim exemption from judicial process in the first instance; and Congress having failed to provide a mode for the exercise of such jurisdiction, it is true that the United States are so exempt, except in cases where they consent to be sued. But where they do consent, they part with any superior privilege they may have; they submit their claims like any other litigant. And the same, if they be the *actor*. Once in court, either as actor, of their own motion, or as defendant, by their consent, their power over the cause is gone, as much so as that of the opposite party. (6 Wh. 380; 6 Pet. 711.) All writers on political law recognise this as a *necessity* of a free government. Vattel says it is a rule in all well-regulated States, not the dominion of a despot, that the tribunals decide those cases in which the sovereign is a party with as much freedom as those between private persons; and that every attempt to meddle with their decrees is an assumption of arbitrary power. (Vattel, ch. xiii., § 164, 166.) And we know that it was to guard against any legislative or political interference with judicial functions, or with cases pending in the courts, that the judiciary of the United States was placed by the Constitution on the staunch and independent basis which it occupies. (Federalist, No. lxxviii.; 3 Sto. Com.§ 1601, 1621; see also Dr. Paley's remark, cited 3 Sto. p. 467.) If it be admitted, then, that the case before the commission was such a judicial controversy as would justify the court below in taking cognizance of it, yet that would only show positively that it was not in the power of Congress to legislate concerning it, or to prescribe new rules for carrying it on, or a new basis for removing it from court to court, or to enlarge the time for the ripening of the decree of the commission, or to do any thing affecting the time or manner of its decision, that the other party could not do; and this, upon the ground, both that a party cannot be a judge in his own cause, and that the legislation of the United States cannot interfere with the course of justice. If Congress could interfere, then at what point need they stop? Is there any legislative power over this cause now? If not, when did it cease? If there be, when will it cease? The courts of the young State, whence this appeal comes, have given in a recent case a striking instance of the manner in which they hold the State, sovereign though it be, and possessed (not like the Federal Government) of general legislative powers, to be amenable to the laws. The general law of California authorizes its courts to issue writs of injunction on terms prescribed in the statute. The legislature, however, passing an act for the appointment of commissioners to sell a supposed interest of the State in certain lands in the city of San Francisco, forbade the courts to allow any injunction for interrupting the proposed sale. The courts in the firmest manner disregarded the prohibition, issued an injunction on the terms prescribed in the general act; and on the commissioners undertaking to proceed in defiance of the injunction, seized and committed them for contempt. The courts held, that undoubtedly the legislature might abolish the writ of injunction; but that they could not exempt any particular parties or interests from its operation, while it continued to be a remedy allowed by law; in other words, that the State could not make one law for its citizens and another for itself; and we shall perceive, in a clear and striking light, both the reason and the reasonableness of this conclusion, if we reflect, that in the statute prescribing general rules of jurisdiction and practice, the legislature was acting for the State in its public—law-giving—capacity; whereas, in passing an act for the sale of property of the State, it was representing the State in respect of its private interests, which are subject to the same laws as other private interests.

Another point in which the act of 1852 is null presents itself in this, that the appeals it proposes are to decisions already final, and beyond the reach of revisal. There appears no reason in this case for departing from the rule of construction that requires statutes on the same subject-matter to be construed together; and hence it would seem, that the "final decisions" spoken of in the act of 1852 must be understood in the same sense as the "final decrees" spoken of in the act of 1851; and these, we have already seen, are such decrees as have been pronounced by the highest tribunal, or ripened by lapse of time, and so become "*conclusive* between the United States and the claimant." (Act of 1851, § 13, 15.) If, however, "finally confirmed," and "final decrees," as used in these sections, and "final decisions," as used in the act of 1851, do not mean the same thing, then there was nothing in the action of the commissioners to appeal from, under the act of 1852, as it was a "final decree" which the commission undertake there to render. And a decree thus "conclusive," either by law, or by agreement of the parties, is not in the power of Congress to disturb. Several instances are given where the State legislatures have attempted by legislation to open final judgments; but in no instance has it been sustained. (See Smith's Statutory and Constitutional Law, p. 518, et seq., and authorities cited.) In a Connecticut case this court (3 Dal. 386) held, that an act of the legislature granting a new trial after the time for appealing had elapsed, was not unconstitutional; but this decision was on the ground that the legislature, or general court of Connecticut, was possessed of certain judicial powers, and this act, being judicial in its nature, would be held to have emanated from the judiciary side of the assembly. The ground, therefore, on which that act was sustained, is precisely that which would defeat a like one on the part of Congress; since the entire judicial power of the United States is given to the courts, and consequently none of it to Congress. A case in 7 Pet. 222 (Sampeyreac et al. *vs.* United States) may also be properly noticed in this connection. Under the act of 1824 for adjudicating land claims in the territory of Arkansas, a number of claims were confirmed which were subsequently ascertained to be fraudulent; founded on forged instruments and prosecuted in fictitious names; and in 1830 an act of Congress directed that the same court should take cognizance of bills of review brought on the part of the United States to set aside those unfounded confirmations. This act was held to be constitutional, and competent to Congress, notwithstanding the time for taking an appeal had expired, and the provision of the act of 1824 was, that on the expiration of that time, without an appeal having been taken, the decision should be "conclusive between the parties."

The decision was undoubtedly correct; not alone on the ground on which the opinion is mainly based, and beyond which it was not necessary for the court to go, namely, that there were *no parties* in the case originally—the supposed claimant being non-existent—and consequently no one to whom the United States could be bound by the decree; not only on this ground was the decision correct, but on various others: 1. The act of 1824 only authorized the court to take cognizance of claims originating under the former governments of Arkansas; and if it took cognizance of any other, whether through deceit or any other cause, its judgments in the premises were null, and the United States had a right, as an individual in like circumstances would have, to an action to set it aside. 2. Fraud vitiates whatever it enters into; and if this simulated claim had ever ripened into a patent, no one can doubt that the United States might have commenced their action to vacate it. I go farther than the court found necessary in deciding the case, and say, that even had there been a real party in the first instance, and he had appeared and defended against the bill brought under the act of 1830, yet, if his grant were forged, and his judgment consequently obtained by fraud, it would still have been the privilege of the United States to bring an action, and the duty of the court to entertain it. But I do not base these opinions on the idea that the United States got any new rights, or the court in Arkansas any new authority to decide the cause in favor of the United States by virtue of the act of Congress under which the bill of review was entertained. Far from it. The United States cannot legislate themselves into rights, and they cannot instruct the judiciary how, or on what principles, they shall decide a cause.

This kind of judicial legislation, as shown above, has often been attempted, but never sustained; and is never so unjustifiable as when attempted by the State in cases to which it is itself a party. All those parts of this Arkansas act of 1830, therefore, which go to instruct the court, or to declare the effect of its decisions, are merely null; those parts which direct the suits to be commenced and authorize the court to hear them are just and legal; but they are based not on new rights which the legislature thus creates for the State, but on antecedent existing rights. A doubt, in fact, might be suggested whether the United States, in pursuing a remedy in the premises, ought not to have been confined to the laws as they were, and if the enactment of a new remedy for the occasion was competent to Congress. I start, however, on the fundamental idea, that for every right there should be a corresponding remedy, and a party against whom a fraudulent decree has been obtained is entitled to a remedy—is entitled to a proceeding by which the fraud may be exposed and the decree vacated; and if the existing laws do not give him a remedy, it is the duty of the legislature to supply the omission and enable the courts to hear the cause. If, therefore, the laws as they were gave no remedy for a fraudulent judgment that might be rendered in the federal courts in favor of a fictitious person, founded on forged papers, and sustained by a perjured witness, it was the duty of Congress to supply that remedy, whether the United States, or any the humblest citizen, were the party aggrieved. But, apart from any special legislation, the United States have always the power to bring an action in the federal courts—precisely as any other parties whose cases are there cognizable—against whomsoever, and if they show cause, can sustain the action; and this was all that was done under the act of 1830, and it could probably have been done as well without an act of Congress as with.

There is nothing, therefore, in this case in 7 Pet. to show that Congress can interfere with a sentence which has become definitive by operation of law. The decision in this court is no more final, nor final in any other sense, than the final decisions of the commission. Neither can be reviewed for *error* in any judgment or proceeding connected with them. But I suppose, if any decision rendered in these California cases were hereafter discovered to be based on forged papers, and rendered to a fictitious name, even if the case had gone so far as the issuing of a patent—that the United States might, with or without an act of Congress, bring an action to ascertain the fraud, and set aside the decree, and vacate the patent. At all events, if they had not the right, they could not legislate themselves into the right. An example in point is presented in a late melancholy occurrence of a fraud committed before the commission appointed to adjudicate claims against Mexico which had been assumed by the United States. Large amounts of the money thus fraudulently obtained from the United States are reported to have passed into the hands of counsel engaged in prosecuting the claim under which it was paid.

Now no one doubts that Congress might direct suits to be instituted to pursue this money in the hands of its recipients; but no one will pretend that Congress can direct the courts how or on what principles they shall decide those suits, or provide that they may be either commenced, or prosecuted other than by due process of law, or before any other tribunals than the federal courts. Again, in the case above cited of the United States *vs.* Ferreira, in 13 Howard, the court intimates a doubt of the constitutionality of a certain act under which money had been paid by the United States to claimants in Florida; and say, that if it be unconstitutional the money might be recovered back; but the case could only arise "in a suit by the United States," brought to that end. Of course, Congress might direct such suits to be brought, but they could not direct the courts how to decide them, nor institute them before a special board, like the California commission. Obtaining money by illegal means, whether from the United States, or any one else, raises an assumpsit to pay it back, and the courts would be bound to decide the case on the same principles between the United States and an individual, as between two individuals; and this duty could not be affected by any privileges an act of Congress might undertake to reserve on behalf of the United States.

But I consider this point to have been already in terms decided by this court in the two cases of Benner et al. *vs.* Porter, 9 How. 235, and the United States *vs.* Ferreira, 13 How. 40.

The first of these cases decides, in so many words, that the admission of a State into the Union brings the territory of which it is composed under the full operation of the Constitution, and the judicial power of the Union can then be exercised only in conformity with its provisions; and consequently the courts which Congress may establish within it must be on the basis of the Constitution, and their judges must possess the constitutional tenure of office, before they can become invested with any portion of the judicial power of the Union; and that "there is *no exception to this rule.*" It follows, then, as a necessity, that within the limits of the State of California, Congress could not bestow on the commission, nor the commission receive, any portion of the judicial power of the United States; and as it certainly did not receive any portion of the judicial power of the State, and as all judicial power within the United States must be derived from one of these two sources, namely, the authority of the Union or the authority of a State, therefore it did not possess any portion of judicial power; and a judicial case could not arise before it.

The case of United States *vs.* Ferreira, in 13 How., arose as follows: In the treaty with Spain of 1819, for the cession of Florida, the United States stipulated to make satisfaction for injuries sustained by Spanish inhabitants in the previous operations of the American army in Florida; and to carry into execution that stipulation of the treaty, Congress in 1823 passed an act authorizing the judges of the superior courts at St. Augustine and Pensacola to receive and adjust the claims that should be presented to them; and in 1849 another act of like import, and substituting the district judge (Florida having in the meantime become a State) for the judges of the superior courts. Under this latter act, the claim of Ferreira was presented. The judge, supposing the case to be judicially before him, gave to the proceedings as much as practicable the form of a proceeding in a court of justice. A petition in form was filed; and the district attorney appeared for the United States, argued the case, and prayed an appeal. But this court decided that (as in the present case) the act of Congress did not require a petition; that the claimant had nothing to do but to present his claim with the vouchers and evidence to support it; and that the judge was not sitting in a judicial character, but as a commissioner; and consequently an appeal would not lie from his award. In one particular only, this case differs from the one before the court, in respect of the point under consideration. That particular is, that in the case of Ferreira no act of Congress had assumed to authorize an appeal from the decision of the judge (or commissioner.) But all the reasoning of the court goes to show that such an appeal could not be, whether Congress prescribed it or not; and the decision was on the ground that the decision of the judge was not the judgment of a court of justice, but the award of a commissioner, and such an appeal "would be an anomaly in the history of jurisprudence." It would not be less an anomaly, I suppose, if Congress had undertaken to authorize it. In that case the judge attempted, at least, to make the proceedings judicial; but the court decided that the "act of Congress did not authorize him to convert a proceeding before a commissioner into a judicial one." In the case of Cervantes, the commissioners did not attempt (beyond requiring the claimant to present a petition) to make their proceedings judicial; nor if they had done so, did (or could) the act of Congress so authorize them; and so, consequently, the fundamental objection, on which the case of Ferreira was decided, and this court refused jurisdiction of it, stands in the case of Cervantes to impeach the proceedings of the court below. Whatever the act of Congress, the fundamental objection remains; the proceeding was not a judicial one; the decision was not a judgment of a court of law. The duties, the court further decided, performed by the judge in the case of Ferreira, were "entirely alien to the legitimate functions of a judge or court of justice;" whence it would follow, that had this court undertaken appellate jurisdiction of the case, it also would have been in the exercise of functions altogether alien from their judicial functions under the Constitution. Again, when the court say that an appeal might as well have been taken from the awards of the commission on the Mexican indemnity, do they mean to say, that if Congress had attempted to authorize such an appeal, it would have been competent for this court to entertain it. I am certain they do not mean to intimate any such thing, but the contrary; namely, that the difficulty is in the Constitution, and in the nature of the case: that a judicial appeal will only lie from a judicial proceeding. The Constitution makes this court an appellate tribunal in nearly all the cases that can come before it. But its appellate power is judicial only, and can only be judicially exercised. No doubt, in fact, this is the first instance in which it has ever been pretended, that this or any of the federal courts could take cognizance, either original or appellate, of a cause not judicial, in the constitutional sense.

Again, in Ferreira's case, the court say: "It is too evident for argument, that such a tribunal is not a judicial one, and that the act of Congress did not intend to make it one." So, neither did Congress intend to make the California land commission a judicial tribunal; and if it had so intended, we have seen that it had not the power. Again: "A power (such as that exercised by the Florida judge) of this description may constitutionally be conferred on a secretary as well as on a commissioner; but it is not judicial in either case, in the sense in which judicial power is granted by the Constitution to the courts of the United States;" consequently, a judicial case could not arise before it, whether with or without the aid of an act of Congress.

The court, in the case of Ferreira, refer to the old case of Hayburn, which arose in 1792, and is reported in 2 Dal. 409. It arose under an act of Congress, directing certain duties to the circuit courts of the United States, and directing that their opinions in the cases specified should be certified to the Secretary of War, who might, if he thought proper, suspend the execution of them, and report them to the ensuing session of Congress; and the judges of each of the several circuits (and the Supreme Court afterward) unanimously held, that as the duties imposed were not judicial they could not exercise them, and moreover it was not competent for either the secretary or Congress to revise their decisions. I apprehend that the converse of the proposition is equally true; and that as a revisory power could not be given to a secretary or any other officer, nor to Congress, over the decisions of the court, so neither could a secretary, or any other officer, or Congress itself, become a judicial tribunal, so as to give the courts an appellate jurisdiction of their decisions. (Ohio case.) The revisal of a proceeding or decision that is not judicial, is not a judicial function, and hence cannot be exercised by the courts of the United States. Cases are daily occurring in the departments, where from a decision of a clerk, or head of a bureau, appeals (so to speak) go to the secretaries; thence, for advice, and sometimes for decision, to the attorney general, and finally to the President. Now, will it be pretended, that an act of Congress might constitutionally direct that appeals should lie from those decisions, in any of their stages, to this court? No—no one will pretend it; and why? Because the exercise of that jurisdiction would be *original* and *not appellate*, and it is not competent to Congress to confer on this court any original jurisdiction. All the original jurisdiction it possesses is in the Constitution. But it would be competent to Congress to establish an inferior court, before which such cases might be brought by regular judicial proceeding, with an appeal thence to this court. And so it was competent for them to enact, as they did enact, a mode in which the cases passed on by the courts in California might be brought by original process into the courts below, and thence by appeal here. And so they might (in the first instance) have enacted, that the decisions of the commissioners should be reported to a secretary here, and that he should thus pass on the claim secondarily. But could they then have given this court appellate jurisdiction of the cause, from his decision? No, because it would then have been in this court *original*, not appellate jurisdiction. If an appeal would not lie from a decision of a clerk, or of a secretary, or the President, or from the commission in California to this court, it would not lie to the district courts; but an original proceeding could be commenced there, but not here. The rule may be briefly stated, and is this: that in order for appellate jurisdiction to be exercised by the supreme or any other court of the United States, the cause must have had somewhere a prior judicial cognizance.

It seems to me, in fact, that Congress could as lawfully direct that appeal should be taken from the district court to the commission, as from the commission to the district court. If they be both courts, the commission is certainly not the inferior one; its territorial scope is more than double that of the district judge—being co-extensive with the State; it is three times more numerously composed; the salaries of the members are higher; their abilities and learning quite as respectable. If both be alike judicial tribunals, I do not perceive why the commission should not be renewed from time to time, and be made a court of appeals from the courts of the two districts over whose territorial limits their jurisdiction extends. And if they be alike capable of originating a judicial cause, there is no reason why that might not be done, nor why appeals might not come direct from the commission to this court.

I treat the two decisions last quoted (9 Howard and that in 13 Howard) together; and together they cover this point of our case perfectly. The case in 9 How. decides that in the limits of a State, Congress cannot establish any judicial tribunal other than on the basis of the Constitution; and the case in 13 Howard decides that the federal courts cannot take appellate jurisdiction of causes from any other than judicial tribunals. (See also 1 Cr. 175.) "It is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted, and does not create that cause."

IV.—I now present the proceedings of the court below, as a breach of contract with Cervantes, and in derogation of his rights, and that in several aspects.

1. The act of 1851 was a proposal of one land claimant to a counter-claimant to settle their controversy in the manner and on the terms therein set forth. Cervantes assented to those terms, by filing and prosecuting his claim before the commission; and thereby the act of 1851 became a *contract* between the United States and Cervantes, which neither party could alter or abandon without the consent of the other.

According to the view that I take of the character in which Congress enacted the statute of 1851, it was an enactment quite as competent for Cervantes to make as for Congress. That is, there being a dispute concerning the ownership of the land in question between Cervantes and the United States, I suppose them to stand, with reference to that dispute, as equals before the law; consequently, one as free as the other to propose or reject a mode for its adjustment without going into the courts.

If this be true, it follows, that the act of 1851 affects the parties to this controversy exactly in the same manner as if it had been originally devised by Cervantes, proposed by him to Congress, as representing the United States, and by Congress assented to on behalf of the United States; or, exactly as an agreement, or stipulation, in like terms, if entered into between two individuals, counter-claimants to the land, would affect the parties to it. If the act of 1851, then, had been the work of Cervantes, and assented to by Congress, instead of being the work of Congress, and assented to by Cervantes, could he of his own motion, after it had gone into operation, change its terms? If he could not, it follows that, on the other hand, neither could the United States. As between individuals, no one would think of calling a proposal and acceptance of terms like those of 1851, any thing else than an agreement for the reference and adjustment of a controversy. For what possible reason does it bear another character, because the United States are one of the parties? If they could have given laws on the subject, then Cervantes would have been obliged to obey them; but we know that this was not the case; that Cervantes was at full liberty to disregard the act, and would have lost no legal right, and subjected himself to no legal penalty, by disregarding it; that consequently his subjection to it is by his consent. Does it not follow, that his subjection to it is only *so far* as he consented; and that as he did not consent to any change in its conditions, so neither can he be affected by, or subjected to, any such changes? And where the validity and obligation of an act depends altogether on mutual consent, what else can it be than a contract, and can its stipulations be otherwise than mutually binding?

If we are right in supposing, as is assumed in our brief, that the same acts constitute a contract on the part of a State as would constitute a contract on the part of an individual, then there can be no question that the act of 1851 and Cervantes's acceptance of it, by presenting and prosecuting his claim according to its provisions, formed a contract between him and the United States. If two parties go with their dispute before a tribunal into which neither could have compelled the other, how is it that they go there except by agreement? And if they go there by agreement, does not that agreement necessarily carry with it, and make binding, all the parts of it? And if the same acts that, done by an individual, would constitute a contract, do not bind a State in the same manner; it would be interesting to know where the line is drawn. The distinction does not exist by virtue of any political or sovereign power in the State; for, in the first place, this Government has not any such power with respect to the subject matter; and, secondly, there is no contract more binding or sacred than legislative or sovereign ones, as this court has often decided. 6 Cr. 87–148, (Fletcher *vs.* Peck.)

It was argued, however, in the court below, that though this might be a contract, yet the Constitution does not forbid Congress from passing laws impairing contracts; that the prohibition was confined to the States. I did not anticipate a repetition of that argument here; but I nevertheless find it intimated in the attorney general's brief. It admits, however, of a summary answer. In the first place, the plan on which the federal government is organized does not require that powers shall be prohibited to it, and we look for its authority, not to what is forbidden to it, but to what is granted; secondly, the prohibition to the States against passing laws impairing the obligation of contracts is not based on the idea that without that prohibition the States would have authority to pass such laws, but on the expediency of bringing cases in which such questions are involved within the federal jurisdiction: and lastly, and more than all, the duty of performing contracts rests (not alone on municipal, but) on *universal law:* the obligation is in the contract itself; in the assent of parties, and in the sanction of universal law. (6 Wh. 27, Webster's argument, and authorities cited.) In the case of Fletcher *vs.* Peck, Mr. Justice Johnson (6 Cr. 143) puts the doctrine in a strong light. "I do not hesitate to declare (he says) that a State does not possess the power of revoking its grants. But I do it on a general principle, on the reason and nature of things; a principle which will impose laws even on the Deity." I will venture reverently to add, that, at least, it is a principle by which the Deity has imposed laws on men and on States.

I will not argue this point farther; but assume, that if Cervantes acquired rights or advantages under the act of 1851, by positive and onerous acts of his own in pursuance of the provisions of the act, it was not within the functions of Congress subsequently to take away or impair those rights. And if he did not acquire rights, what was the object of the act? What was the object of the United States in incurring the large expense of instituting and maintaining the commission? or of Cervantes in the still larger (proportionately) expense and trouble of prosecuting his claim before them? Was it all mere child's play, intended for no good to either party? Will Cervantes have acquired any rights or advantages when his case shall have been finally and favorably passed on by this court, or may Congress still legislate him to another process and another tribunal?

As far as *legislation* goes, they will have, then, as good a right as they had in the incipiency of this case, to send him before a commission. But, if the decision of this court in his favor will be final, and place his case beyond Congressional action, on what principle is it that his first acts of compliance with the requisitions of the act of Congress did not give him the advantages (and all the advantages) set forth and promised him in the act as the *inducement* for him to consent to its onerous provisions?

Suppose Cervantes in consultation with counsel, with respect to the propriety of submitting his cause to the commission, under the provisions of the act.

"I don't understand English, (he says,) and therefore I come to you to explain what are my rights under this act of Congress. I am told there is nothing compulsory in it; and even that it is not in the power of Congress to pass any act which will be compulsory on me in the premises, or bring me before this tribunal, without my consent. To come before it, is expensive and troublesome; and particularly so to me, an old man, who never had a lawsuit, and don't know how to carry one on; living in a remote part of the country; poor and ignorant, and my neighbors (and consequently all the witnesses I shall be able to bring) of the same simple class. I wish to know, therefore, what my position will be, if I comply with those conditions; if I incur this expense and trouble? What obligations do I impose on myself? What are imposed on the Government? What rights or privileges accrue to me? All the conditions of the act seem to me to be hard; but I suppose that that great and good Government at Washington knows what is proper, and I am desirous, if I can, to meet their wishes, and test in the manner they propose the validity of my right to the land that Mexico gave me. I only want to know, as I am to be the actor in the proceeding, what I am to gain by it, before I begin." No doubt, if Cervantes had had the good fortune to consult in this manner with the attorney general, he would have had a reply something like this: "I don't know, sir, what your rights or advantages are under this act; they are not ascertained by it; I can't tell what you gain, nor to what terms you bind your adversary. I can read English very well, and know what this act promises to you; but your adversary is great and powerful, and doesn't hold himself bound by engagements; and after you begin, if he find the case going against him, or repents him of his good nature, in doing what was his duty, but what he couldn't be forced to do, he may change the whole affair without your leave, and put you in a worse box than you are now." This is no doubt what Mr. Attorney General, enlightened as to the powers of Congressional caprice and authority, would have replied to such questions from Cervantes. But, out in that new and remote country we had not learned so much, and I believe it was the universal supposition of the members of the bar, that they could reply to such inquiries, which were quite common, that the provisions of the act were mutual, and when the claimant should decide to accept of it, he would be entitled to have his case promptly decided by the commission, according to the principles laid down in the 11th section of the act, and to all the other provisions of the act which would be advantageous to him.

This is not a new doctrine with me. It seemed so clear to my mind, so certain, and I had so little idea that a doubt of it had been or ever could be entertained, that I introduced—not the doctrine—but *the fact*, as I thought, into my argument of this case, before the commission—two years ago—by way of illustration of a point in the Mexican Regulations of 1828; and I am certain no one who heard me doubted the correctness of the proposition, whether the application of it was correct or not. The brief of the attorney general confounds the change of procedure proposed in the act of 1852 with those changes which are frequently made in providing for the administration of justice in the mode and the forum where remedies are to be sought or perfected. I am persuaded he has not rightly considered the case. Here, the mode and tribunal are of the *res gestæ*. It is a part of the undertaking; the remedy prescribed for the particular thing, and which Cervantes accepted as a whole, not as a part. Changes of mere remedy and forum, *pendente lite*, are however received with distrust, and will not be sustained if they violate a substantial interest; and I do not believe there is an instance extant of a legislative transfer of a cause from one court or one mode of procedure to another, except where a change of government, or a remodeling of a system, made it necessary. Judge Kent says that any interference with private rights, and pending suits, are to be looked on with disgust and indignation, and our constitutions do not admit the power. (7 Johns. 477—cited 4 Wh. 578.) But in this instance, if the act of 1852 be a rightful exercise of power, Cervantes not only did not acquire any advantages to himself, or bind the United States to any thing, by acquiescing in the provisions of the act of 1851, but he actually lost privileges by it, and conferred on the United States a means of getting him and his claim into court that they could not otherwise have had; for to have brought him into the courts by a direct action, the regular process of law would have been necessary, and the grounds of the action set forth. So, according to the argument, Cervantes, by consenting to one part of a proposition, lost not only his rights under the remainder of the proposition, but also other most valuable civil and constitutional rights.

If one give his obligation to pay money, the mode and the forum before which the obligation may be enforced are not of the substance of the contract; but it may be enforced wherever the obligor may be found, or has property, before the tribunal, and in the manner prescribed by the law of the place where the suit is brought. But if he couple with his obligation a power to the payee to confess judgment in case of non-payment, and the legislature attempt to take away that remedy, that would be to impair the obligation of the contract, because the remedy is of the substance of the contract. Or, (the precise case in hand,) if two disputants agree to refer their matter of dispute to a special commission or board of arbitrators, conditioned that if either party were dissatisfied with the decision he might carry the controversy, within a certain time and in a certain manner, into the courts, this would be a mutual release of all other actions (in reference to the subject matter) than the particular one provided for; and at the expiration of the limited time, without that action being commenced, both parties would be held to have acquiesced in the decision, and no legislative act could interfere for one or the other of the parties to provide another remedy, because the remedy is of the substance of the contract. And I contend, if the legislature could not thus interfere on behalf of an individual, they could not on behalf of the State; that such an arrangement between individuals is in all respects a contract, and its character is noways altered by the United States being one of the parties: in fact, that there was no possible way for the United States to get Cervantes before that commission than by a contract, by a bargain, with him. And to say, that after making this bargain, the United States could not only back out of it, but by virtue of backing out legislate Cervantes into court in the manner proposed by the act of 1852, is not only to say that they can legislatively impair the force of their contracts, but by means of that iniquity can acquire rights they did not have prior to the contract. I refer to the whole cases of Fletcher *vs.* Peck, in 6 Cr., and of Green *vs.* Biddle, 8 Wh. 1, and to the other cases cited in the brief.

A contract, say this court in both those cases, is "the agreement of two or more parties to do or not to do certain acts." Now do the

United States agree or stipulate in the act of 1851 to do or not to do any thing, on conditions specified? If it do, and those conditions be accepted and complied with, then it is a contract. They do stipulate, then, that, in order to be "*entitled*" to a review of the decision of the referees which they offer to Cervantes, they shall give notice of their intent to do so within ninety days, and shall absolutely commence the proceeding within six months; and they promise that they will not commence (as indeed by law they could not commence) that action except in a fair and open manner, and with the grounds on which they contested his right "fully and distinctly set forth;" and they also stipulate that the decisions of the commission, after the lapse of the specified time, and of the courts, shall be conclusive; and if in favor of the claimant, he shall be entitled to a survey and a patent; and also that those decisions shall be rendered on certain just principles specified in § 11; and that the claimant himself, in case the decision be against him, shall have a right to bring his action in the couris, in like time and manner. In consideration of all which, Cervantes consented to enter the *terra incognita* of that dependent, extra-constitutional tribunal, to encounter the opposition of the attorneys employed to "attend to the interests of the United States;" to employ counsel and bring witnesses, (though to what ends or to what points, groping in the dark to guess,) and take the risk of the protracted and expensive litigation, which now, only, his counsel venture to hope they dimly see the end of.

Now, if this lacks any of the elements of a contract, it would be of great interest to know what it is, that a new dictionary might be framed, and simple-minded people no longer be deluded.

Let it not be supposed that Cervantes went willingly before that commission. His fears consented, nothing else; i. e. not his will nor his sense of right, but his apprehensions, produced his consent. But he consented, and only now asks that he be saved in the terms and conditions on which he consented.

Is he not entitled to that? If not, to what portion, if any, of the stipulations or promises of the act is he entitled? for none are written with as much solemnity or explicitness as the precise ones which the proceedings in the court below aimed to take away, namely, those that relate to the time and manner of review of the decisions of the commissioners. Is he entitled (beyond legislative control) to a survey and patent, when he shall have got the favorable decision of this court? The survey or patent are not promised so explicitly. Is he entitled (beyond legislative control) to the principles laid down in §11? These, the attorney general says, relate to the right *ad litis decisionem*, and remain unchanged, though he does not say unchangeable; and the question is, could they have been changed; if not, why not? because they relate to the right *ad litis decisionem?* No. But because they have the same force as all the other stipulations of the act; they are in force by agreement; they are the rules of decision by agreement; they could not have been legislatively prescribed, or else they might be legislatively abolished. Suppose this case against Cervantes had been brought by the United States in the court below, could Congress, by legislation, direct that court on what principles to decide it? By no means. It would be quite as competent to direct *how* it should decide it, as on what principles they should decide it. If they could legislatively enact that the court should decide on the principles specified in § 11, they could have directed that it should have been decided on the principles of the Twelve Tables, or the writings of Confucius. They could direct that the suit should be brought, and that direction would carry with it the direction that it should be tried according to law. Any thing beyond that would be judicial, and not competent to Congress. (12 Pet. 737, 742.) How then does § 11 get in and become authoritative? By the same rule that Cervantes's case got into the commission, viz., by consent; the United States, in consenting to be sued, prescribed that as one of the terms of their consent, and Cervantes agreed; and that is the way it got in, and the reason it cannot be got out, except by the same mutual action. And this brings me to another point, which to my mind presents the act of 1851 as a contract, in a still more imposing aspect.

The immunity of the United States from judicial process enabled them to prescribe *conditions* to their consent to afford Cervantes a remedy in this instance, and to prescribe very hard ones. They did give this consent, and prescribe these conditions, else it is certain that Cervantes never could have instituted his claim—his "suit," as the attorney general calls it. Whatever the nature of the proceeding, therefore, before the commission, or whatever the character of the commission itself; whether a court or an arbitration, it is certain that the proceeding before it was by *mutual consent,* since the United States gave its assent to the institution of the proceedings, and Cervantes voluntarily instituted them; it was then commenced by mutual consent, and on conditions prescribed by the United States. Now what kind of consent is that which, granted, and coupled with onerous conditions, when accepted, and the conditions fulfilled, is no longer binding on the grantor? If the United States were acting legislatively in giving that consent, then the giving of it was a *legislative grant*—a grant of privileges, privileges on condition, which conditions being complied with, the grant became perfect.

It is assumed in our brief, that this immunity from judicial process is the sole advantage [of course I mean with respect to the subject matter of this controversy] which the United States had over any individual who might have purchased the residuary interest of Mexico in California. The attorney general does not agree to this view, which I regret; but am consoled with the reflection that the decisions of this court, and the instincts of common sense, sanction it. In the case of the United States *vs.* Bank of the Metropolis, 15 Pet. 392, this court say, that when the United States "become a party to negotiable paper, they have all the rights, and incur all the responsibility of individuals who are parties to such instruments. *We know of no difference, except that the United States cannot be sued.*" Which, I venture to say, can with as full truth be rendered, "that when the United States become parties to a controversy concerning lands, they have all the rights, and incur all the responsibilities of individuals who are parties to such disputes; and there is no difference except that the United States cannot be sued;" and this, the court has said, in substance, in Aredondo's case, 6 Pet. 711, and often besides.

But the attorney general thinks they got also "sovereignty and jurisdiction," and the "political powers of government." Suppose they did; sovereignty and jurisdiction, and the political powers of government, would give them no advantage in a judicial controversy, or a question of right of property, unless the sovereignty, and jurisdiction, and political powers of government which they obtained, were of that despotic kind that they were enabled to be the judges in their own cause. Nor does the attorney general think that in passing the act of 1851, the United States parted with their "political sovereignty and jurisdiction, nor tie their hands against future legislation." Granted: but they did part with that power, in the act of 21st September, 1850, for the admission of the State of California into the Union. That act left the United States barren of all political, or sovereign, or legislative powers in California, which they acquired, or could have acquired, from Mexico; not a jot or tittle of it remained; not a vestige. After the admission of the State, all the power of the United States, on or over, or with respect to California, of a political or legislative kind, came and existed by virtue of the grants of power contained in the Constitution of the United States, not a shadow of that which they derived from Mexico remaining; and if the position of the learned attorney general were correct, that the sovereign power of the United States in California, and their proprietary rights were on the same footing, and derived and held by the same tenure, then all the public lands in the State would have gone, along with the sovereignty, to the State, on the same principle, and by the same reasoning that the public or crown lands in the different States went by the revolution, along with the sovereignty, to those States respectively; and the reason that the public lands—the lands of the United States—in California did not pass with the sovereignty to California, was the same reason that prevented private lands in the States from passing by the revolution to the States; namely, that *they were private property;* the private property of the United States; the private property of that body corporate which has the seat of its principal operations here in this city. (See 1 Dal. 41, and 4 Wh. 667.) The United States do not hold lands as a sovereign, or in virtue of sovereignty; if they did, their ownership would pass, along with the tenure by which it was held, to the States. Neither does its sovereignty, where it possesses it, depend on its ownership; otherwise it would cease in the territories, technically so called, acre by acre, as the lands were sold to private hands. The United States do not hold lands, and especially in the States, with any sovereign right or capacity; the anomaly of an empire within an empire does not exist in our system; nor does the Constitution so suppose it, unless it also supposes that the

United States hold all sorts of personal property in the same way; and that when they send to auction a lot of refuse army stores, or an old hulk of a vessel, or a spavined mule, they are giving a portion of their political power to the hammer; for the Constitution treats them all in the same way; it is "territorial and other *property*" that Congress is authorized to—what? make laws about?—no, but *to administer*. The argument of Cervantes, then, does not suppose as the attorney general imagines, that the filing of the claim of Cervantes, and thus his acceptance of the provisions of the act of 1851, had the effect of taking away the legislative power of the United States; but that the United States never had any legislative power in the premises, any more than they had the power of legislation over a dispute they might have had with Cervantes concerning the ownership of a yoke of oxen.

Had an individual, then, instead of the United States, purchased the residuary interest of Mexico in California, and Cervantes had an equitable right to his land, but lacked the legal title, he could have gone into the courts of his own motion, and compelled the vendee of Mexico to give him the additional muniment he was entitled to. But he could not do this with the United States on account of (and for no other reason than) their immunity from judicial process. He was not able, therefore, to enforce his right till, and then only on such terms as, the United States should consent to. But when they did consent, and on terms which Cervantes adopted and fulfilled, I say it became a *contract* of the highest and most binding character; one of those contracts which, once in the power of a court, it will hold with its tightest grasp, and rigorously enforce, for the very reason, that in its inception it embraced a trust that was precarious in its nature, depending on the good faith of the trustee for its fulfilment.

Was it not competent, let me ask the attorney general, for Cervantes, on examining the act of 1851, and considering all its terms, to decide that he would rather take his chances with his title as it was? or to say now, that if the provisions of the act of 1852 had been contained in the act of 1851, he would not have accepted it; as, with my advice, he certainly would not, and for two substantial reasons; namely, that I should not have been willing to risk the whole case in the hands of those dependent temporary commissioners, and should have been perfectly sure that neither the court below nor this court could have taken cognizance of my appeal in the manner proposed in the act of 1852; and, second, because, by the act of 1851, there were certain fixed periods, landmarks by which we could know when the decisions of the commission would ripen, and within what time further proceedings might be commenced, and pretty nearly when the litigation would absolutely end; whereas, the act of 1852 (if unaided by the intendments of that of 1851) opens the litigation to indefinite continuance, and subject to the convenience or caprice of an irresponsible third person, (the secretary of the Board); and not only would I not have advised Cervantes to enter the field under such circumstances, but I would not have taken his case for the whole of his substance, because I would not have mortgaged my time for so indefinite a period, or violated my sense of law by undertaking such incongruous, fantastical proceedings. I should have advised Cervantes, therefore, had the provisions of the act of 1852 been first tendered instead of the corresponding ones of 1851, not to present his claim under it, but take the chances of maintaining his title by a possessory action, or an ejectment against the first trespasser, or to wait for a better disposition of Congress.

It is plain, then, that the act of 1851 was a matter tendered to Cervantes's acceptance; and if tendered to his acceptance it was tendered as a whole; and when accepted, and he had gone to trouble and expense to accept it, it became *his;* as much so as when Congress offers a pre-emption right or donation of land on conditions, and the conditions are accepted, the right accrues. So when the United States offered to Cervantes a certain manner and terms of adjustment of their dispute, and Cervantes accepted the offer, the right—the *right*—the right of adjustment in that manner, and on those terms, accrued to Cervantes. Can there be a plainer case?

Or, again, will it be questioned that the United States may by an act of Congress *release* a debtor, for example, or any one with whom they have a dispute proper for a judicial examination; to *release* such an one from all personal actions by them against him, or all actions other than in a particular forum and manner; and might not the party plead that release in bar to an action that should be commenced contrary to its provisions? And if that release were enacted (*executed* is the proper word) on a condition to be fulfilled by the party released, and he fulfilled it, could Congress repeal the act, and again make him liable to the actions from which he had been released? Or, if they say to Cervantes, if you will pursue this mode of our devising, put your claim before this commission of our appointing, and risk a final action on your title, in this special manner; we will likewise pursue our remedy in the manner here set down, and, to be "entitled" to pursue it, we will commence within a certain time; is it not equivalent to saying, in so many words, that they will not pursue it in any other manner; and hence is it not a *release* of Cervantes from an action in any other mode in the premises; and a release on conditions which he has fulfilled? If it is not, then it is a wile and a lure to the unwary, the ignorant, and the simple.

The judge below, from his opinion, evidently mistook the entire nature of this case. Judge Hoffman seems to think that a decision against Cervantes would not take away the interest which he has in the property, but leave him in the same condition as he was before the filing of his claim, for he says (p. 4): "That the grant by the governor had some validity, is not denied. It was the performance of a part, perhaps the most important part of the acts to complete the title." And (p. 5), "There is no doubt, that under the treaty, as well as by the laws of nations, such title as the claimant had acquired when the sovereignty was changed was secured to him as his private property." And (p. 7), "The question is not whether a forfeiture should be insisted on, but whether the United States are bound to complete a transfer," &c. But the judge is mistaken: this is a case that tries the right of property, and is stipulated between the parties that it shall be *conclusive* between them. It is not a question merely whether the United States shall give Cervantes a further security of title, or leave him where he is: it is a question to which of the parties, when the litigation is ended, the property shall belong to. But Cervantes never agreed that a proceeding like that before Judge Hoffman should be conclusive against him; and yet without his agreement the case could not have existed. I say, therefore, that it is an effort to strip him of his property—or, put it in the strongest light against him, his *claim* to property—by unlawful means, and without that due process of law which the Constitution secures to him. This is a different kind of proceeding altogether from that for which Cervantes agreed to forego that constitutional privilege, and agreed with the United States to test their respective claims by, conclusively.

2. The proceedings in the court below were also a breach of contract, and in derogation of the rights of Cervantes, growing out of the guarantees of the treaty of peace with Mexico, and the act of 1851 passed to carry into effect those guarantees, considered together.

According to the decisions of this court, in other like cases, the guarantee of the treaty that the inhabitants of California *shall* be protected, &c., is to be considered in the future tense, and hence was an executory and not an executed trust. The act of 1851 was the execution of that trust, or the mode prescribed for its execution. It was conditional in its terms; i. e. applicable only to those who accepted the terms of the act; to do which Cervantes had to *undergo* great expense, and *forego* his constitutional right of due process of law, and trial before an independent judiciary. In view of the whole matter, however, he elected to accept that proffered execution of the trust. The trust was created in the treaty; Mexico being the grantor, the United States the trustee, and Cervantes the beneficiary; and he having accepted the terms (conditional on his acceptance of them) of fulfilment, the trust was executed, and the trustee *functus officio*.

The Senators who debated and supported the act of 1851 agreed that it was passed in consequence of the treaty, and to carry out the trust which the treaty created and the United States had assumed. Mr. Berrien, the framer of the bill, says: "Here is a bill which it is proposed to enact into a law, the object of which is to carry into effect a treaty stipulation of the United States." (Cong. Globe, vol. 23, pp. 372 and 427, remarks of Mr. Berrien.)

Mr. Ewing and other Senators made similar remarks, and Mr. Gwin (Cong. Globe, vol. 23, App. p. 134,) held that not alone was the act passed to fulfil that portion of the treaty which stipulates for the protection of private property, but that it was expressly demanded by another clause of the treaty. This is the passage:

> "And now the United States find themselves, as the successor of Mexico, pretty much in the same position as Spain did towards France in Upper Louisiana. We have a mass

of individual claims in California incomplete and imperfect, and what does the treaty require to be done? It stipulates that individuals shall be maintained and protected in the enjoyment of their property, inceptive and incomplete as their rights may be. But the treaty does not stop here. By a provision in the 11th article of it, this Government has agreed 'now and hereafter' to 'pass without unnecessary delay, and always vigilantly enforce such laws as the nature of the subject may require.' These are the express terms of the treaty, and under its solemn covenants have I not a right, in the name of my constituents, to call on the Senate for speedy and decisive legislation."

So, this court has always held, that like acts passed in relation to claims in other territory acquired by the United States from foreign powers were passed to fulfil a treaty stipulation—in other words, to carry out a trust. The same is said in the case of Ferreira, in 13 How.; and in fact nothing else can be said of it. The attorney general also so understands it.

If, then, the treaty created an executory trust in the United States, and the act of 1851 was adopted as the means of executing that trust, is it not a plain principle of law that, as for all those who accepted that means, the trust as for them became executed, and the trustee discharged both of his powers and obligations in the premises. I am certain the attorney general will agree that the United States have thereby discharged themselves of their obligations, and that the act of 1852 was not on account of any obligation to the beneficiary of the trust. But how is it that the power or authority of a trustee remains after his obligations are discharged? And how can a trustee change the mode of executing his trust, and that in a manner less beneficial to the *cestui que trust*, after the latter has accepted the mode first adopted—i. e. has accepted the execution of the trust? Is it because the trustee has an interest in evading the trust, and harassing the beneficiary? That is the very reason why he should be held more strictly to the performance of the mode he once adopts, and the beneficiary acquiesces in.

I have likened the right acquired by Cervantes under the treaty—namely, to be maintained and protected in his property by the United States—to that right called in the Roman law *jus precarium;* because it was a right which Cervantes had not power to enforce, and no legal remedy for the enforcement of, but was dependent on the good faith of the trustee for fulfilling. This description of trusts was so often abused among the Romans, that they were afterwards made with an appeal to the protection of the emperor; and Augustus, full of the generous sentiments which ought to animate the breast of a great ruler, whether it be an emperor or a sovereign people, fired with indignation at the baseness which would abuse a defenceless trust, and created a tribunal for their enforcement, and before which the trustee was held to the most rigorous account, and every means given to the beneficiary for discovering any evasion or concealment. Under the treaty with Mexico, this Republic itself became the depository of one of those sacred, defenceless, precarious trusts. They have undertaken to fulfil it; they have established a means to ascertain and enforce it; and at this stage of it this court stands in the position of the *prætor fidei commissarius*—the "particular chancellor for uses," as Lord Bacon calls him—of the Agustan age; with this additional obligation, however, that it stands charged not alone with the duty of enforcing the trust, but also of protecting the honor and faith of the trustee.

The attorney general is mistaken in supposing that the United States have the right of eminent domain in California. The State of California has the eminent domain there. If the rights of the United States in the premises are then (as Mr. Attorney supposes, p. 18 of his brief) to be held as "qualified by consideration of the eminent domain," it must be by the consideration that the eminent domain does not attach to them, and that, consequently, they hold their lands on the same footing—with certain exceptions which are matters of contract between the United States and the State—as all other landholders.

The attorney general is also mistaken in supposing that the objection to the judgment of the court below, because it was delivered at a special, unauthorized sitting—when in fact it could not be a court—is answered by a reference to the third section of the act of 1850 for organizing that court. That section certainly authorizes the district courts of California to hold "extra sessions;" and whether that means adjourned terms, or regular terms, over and above what are specially provided for, or that they are intended to be confined to ex parte proceedings or to cases taken up by consent, I do not profess to know. But I do know that those *extra sessions* are not *special terms;* and also, from the sections following that one, that it is not the intent of the act that defendants or appellees are called on to take notice of any terms other than those held at the times provided by law, or of which notice shall be given as provided. (1 Yerger, 365-'67.)

Cervantes could not therefore be held to have had even constructive notice that the action against him would be prosecuted at this special term, the knowledge of which was confined to the breast of the judge; and it is not the fact that he "appeared and defended the appeal;" he only appeared to protest against the appeal; and even if he had appeared and consented, the jurisdiction was not competent to the judge out of term time. He could not act as a court. We never consented to his acting in the premises at all; but protested against every step that he took; and appeared for no other purpose than to protest; and I now protest that the record, by designating the sitting as of a "special term," vitiates the judgment on its face. If we had consented (which we never did) to that special term, we could still take advantage of it, as it was a mistake *of the court.* (2 Cr. 126.)

We have objected also to the judgment of the court below, that it is not rendered on the pleadings and evidence in the case; and the court had not authority to render a judgment, except on the pleadings and evidence.

This objection is founded on § 10, of the act of 1851, which contains the only authority that I have found for the district court to render any judgment in the premises; and there are no pleadings whatever in this case, and no evidence of which that court could lawfully take notice. The testimony taken before the commission could only be used in a court, either by consent, or (admitting for argument's sake) by statute, and then only to the extent, and for the uses embraced in the consent or prescribed by the statute; and this consent and these uses are those set forth by the act of 1851. The commissioners were empowered to take testimony, but only to a certain end, and the appeal, so called, in the court below was not that end.

That the judge does not recite the facts necessary to show its jurisdiction, I think also well founded. (7 Yerger's Reports, 365–'67.)

The judgment of Judge Hoffman does not recite any fact at all; it only recites *conclusions*. In the opinion of the court, the case was properly before it; but what that opinion was founded on, the judge does not tell us, and when we go into the record, we find that opinion was mistaken. The judgment, for example, describes Fisher's transcript, in the words and as the thing required by the statute of 1852; but Fisher himself does not describe it so, and neither does the thing itself answer the description. Does the opinion of the judge determine the fact against the fact? That would be taking away the appellate function altogether. The facts themselves are here before the court, and not merely Judge Hoffman's opinion of them. So to the judge below it "appears that the transcript had been duly and regularly filed," but is that anything to this court, unless he shows *how* it so appears?

I am firmly convinced that every one of the objections I have taken to the jurisdiction and proceedings of the court below is well taken; and that the list is not exhausted. I am firmly convinced that if the court found it necessary to go through the whole catalogue, every one of those objections would be sustained by their unanimous judgment; while at the same time any one of them is fatal to that assumed jurisdiction.

PART SECOND.

THE TITLE OF CRUZ CERVANTES.

The commission decided that the claim of Çervantes to the land in controversy was valid, on the following facts, namely:

On the 10th September, 1834, Cervantes made a petition in writing to the Governor of Upper California, asking that the land should be conceded to him, (Rec., p. 77, translation, p. 84.) On the 20th September he presented another petition, with a sketch or rude map of the premises. On the 22d, same month, Don José Castro, the governor, made a decree, in which he required the ayuntamiento of the capital (Monterey) to report: "Whether the petitioner possessed the requisite qualifications to be considered;" "whether the land was within the twenty-border or ten littoral leagues;" as to its quality; "whether it belonged to any mission, corporation, or pueblo;" "with everything else that might serve to elucidate the matter;" and, afterwards, refer the matter to the authority of the mission of San Juan Bautista, (pp. 77, 78, translation, pp. 84, 85.) This marginal decree was referred by the ayuntamiento to its committee on vacant lands, on whose report the ayuntamiento resolved that the land petitioned for ought to be granted, if no objections were made on the part of the mission of San Juan Bautista, to which it was appurtenant; and the proceedings being referred to the steward of that establishment, he reported on the 13th October, as follows:

> "The place of San Joaquin petitioned for by the interested party may be adjudicated to him as far as the hills, without touching the oak grove, which is the summer pasture land for the cattle belonging to this mission," (pp. 79, 80, translation, pp. 85, 86.)

The proceedings being then returned to the governor, they were referred on the 4th December, 1835, by his order to the alcalde, or first magistrate of Monterey, with directions to take the testimony of three witnesses, to points therein stated. In pursuance of this order, the alcalde, José Ramon Estrada, examined and reported the testimony of three required witnesses, who each testified that the petitioner (Cervantes) was a Mexican by birth, married, had children, and was of good character; that the tract he asked for did not belong to any village, mission, or individual, &c., (pp. 81, 82; translation, 87, 88.)

The proceedings being in this stage again returned to the governor, (Don Nicolas Gutierrez having in the mean time succeeded to the governship,) he, on the 1st April, 1836, acceded to the petition of Cervantes, and made the following decree:

"MONTEREY, *April* 1, 1836.

"Having examined the petition heading these proceedings, the report of the municipal authority, and everything bearing on the case, in conformity with the laws and regulations in the matter, Citizen Cruz Cervantes is hereby declared owner in fee of the parcel of land known by the name of San Joaquin, subject to the approval of the excellent deputation. Señor Nicolas Gutierrez, lieutenant colonel, commandant general, inspector, and political chief ad interim, do thus command, decree, and sign, which I attest.

"NICOLAS GUTIERREZ.

"F'CO DEL CASTILLO NEGRETE, *Secretary*."

On the same day he delivered to the party a patent, or title in form, to the land, setting forth that all the requirements of the laws and regulations having been complied with, he had, in a decree of that date, in the name of the Mexican nation, granted to him (Cervantes) the said parcel of land, and now "declaring it to be his property by virtue of these letters patent," subject to the approval of the deputation (or council) and to the following "conditions," (so called) or more properly directions:

"1. He will submit to such conditions as shall be made by the regulations hereafter to be made for the distribution of vacant lands, and meanwhile neither the grantee nor his heirs shall divide or alienate that which is adjudicated to them, nor shall they submit it to rent, entail, bond, mortgage, nor to any incumbrance whatever, even if it should be for charitable purposes, nor convey it into mortmain.

"2. He may fence it without obstructing the crossings, roads, and servitudes, putting it to such use and culture as he may deem best, but within one year at furthest he shall build thereon a house, and it shall be inhabited.

"3. He shall solicit of the respective judge to give him judicial possession by virtue of this patent, by whom the boundaries shall be marked, at the limits of which, besides the landmarks, there shall be set some fruit trees or else wild ones of some usefulness.

"4. The land of which donation is made is of two sitios de ganado mayor, (two square leagues,) according to the plat annexed to the proceedings. The judge, who may give possession, will cause it to be measured agreeably to ordinance, leaving the excess, (sobrante) which may result, to the nation for its purposes as may be deemed convenient.

"5. If he shall contravene these conditions he shall lose his right to the land, and it may be denounced by another."

On the 10th February, 1841, Cervantes petitioned the proper judge (the constitutional justice of the peace of that district) to put him into possession of the tract according to the third of the directions appended to the grant; which the judge proceeded to do, with the customary formalities, on the 18th of the same month, setting forth specifically the metes and bounds, and first citing the adjoining proprietors. (Pp. 53, 56; translation, pp. 58, 61.)

The genuineness of the grant, and of the proceedings in the matter of the juridical delivery, is proved by the testimony of Spence, (p. 50,) and of Pacheco, (p. 65,) the latter of whom was one of the witnesses and adjoining proprietors summoned and present on the occasion of the juridical measurement and delivery. The other documentary evidence above referred to was drawn from the public archives, the copy submitted being certified by the officer in charge of them, offered on the part of the United States, and admitted by the counsel of Cervantes to be genuine.

Pacheco (p. 65) and Alexis Godey (p. 63) prove the occupation and possession of the rancho by Cervantes and his family.

Pacheco testifies that it was about two years after the revolution of Governor Chico and Gutierrez, when Cervantes commenced residing on his rancho; and Hartnell (p. 68) fixes the time of this revolution at about the latter part of 1836.

The counsel of Cervantes, being of opinion, that, under this state of facts, Cervantes has a perfect and indefeasible title, labor in the dark in attempting to meet the objections that may be urged against it. Had the act under which only Cervantes consented to involve his title in an extra-constitutional litigation been complied with by the adverse party, the way would be clear, because we should have had "fully and distinctly set forth" before us "the grounds on which the claim is alleged to be invalid;" and we could have met the supposed difficulties by testimony (in the court below) or argument, according to their nature. As the case stands, however, we are left to conjecture the line of defence which we have to follow, and the Attorney General's brief is not yet in our hands. He has furnished me a brief memorandum, however, with the following points of objection:

"1. The mission question.
"2. The littoral question.
"3. The points in Judge Hoffman's opinion."

From which statement I conjecture that the Attorney General will take pretty much the same line of argument as was taken by the law agent of the United States, in the hearing of the claim before the commission, and proceed to meet it accordingly.

The "mission question," alluded to by the Attorney General, he will raise, as I suppose, under section seventeen of the regulations of 1828, which is in these words:

> "En los territories en que haya misiones, los terrenos que estas ocupen, no podrán colonizarse por ahora y hasta que se resuelva si deben considerarse como propriedad de las reducciones de los neofitos catecumenos y pobladores Mejicanos." [In those territories where there are missions, the lands which those occupy shall not be colonized at present, and until it shall be determined if they ought to be considered as property of the settlements of neophyte-catechumens (i. e. converted Indians, neophytes, or pupils of the missions) and Mexican settlers (or inhabitants.)"]

Any objection to the validity of Cervantes's grant that can be taken under this section, must be on the hypothesis that the prohibition against *colonization* is intended as a prohibition of all grants. If this were the sense in which the word is used, the reply then would be, that the prohibition is only to lands *occupied* by the missions, and this tract is shown by the proceedings prior to the grant not to have been so occupied. The ayuntamiento of Monterey report (Rec. p. 79) that it is attached (pertenese—wrongly translated, p. 85, "belong,")—to the mission of San Juan Bautista; but the subsequent depositions taken before the alcade of Monterey, and the report of the steward of the mission, show that the tract, in whatever sense appurtenant to the mission, was not in its occupation. But,

2. The section only forbids *colonization*, and expressly reserves the right of resident citizens to settle in those lands. The language of the section is, that the lands occupied by the mission shall not be *colonized* at present; nor till it be determined if they ought not to be considered as the property of the Indian pupils and of the *Mexican inhabitants.* This phrase has been erroneously translated in some of the public documents, "*Mexican colonists*"—as much as to say, that the lands should not be *colonized* till it be determined if they were not the especial property of *colonists!* a mistranslation which is an apt example of the confusion of terms which has arisen from a loose reading of the colonization laws and rules of Mexico. The section cannot be understood in any other way, than as intended to discriminate between grants for colonization and grants to resident settlers of the country and for the *protection of the latter.* We are warned by the Supreme Court (7 Peters 95) of the necessity of a careful examination of papers translated from a foreign language, containing uncertain and incomplete references to things well understood by the parties, but not perhaps understood by ourselves; and there cannot be a stronger case for the application of this rule. It would be a gross instance of perversion of language and mal-interpretation, to construe this section so as to rob the founders of California of the rights it was inserted for the exact purpose of securing to them.

3. Whatever construction may be given to the 17th section, the laws of secularization, and the subsequent instructions of the Supreme Government opened the Mission lands like others to grants. The regulations established by the Governor and Deputation for carrying that law into effect, went into operation in August, 1834. There was also an act of the Deputation as early as May, 1834, providing especially that the vacant lands of the Missions might be colonized. The question has also been presented in this shape: whether the mere act of secularization, would determine the question presented in the 17th section of the Regulation of 1828, and so open the Mission lands to colonization? The matter does not rest on the mere order of secularization; though if it did it would be quite sufficient for our purpose, as we shall see by reference to the 6th section of the decree of the Spanish Cortes of 13th September, 1813, that secularization of Missions includes the distribution of the lands, and their reduction to private ownership. But the act of 26th November, 1833, directs the Government to take active measures for the secularization and *colonization*, of the Missions of California; and the instructions given in consequence of that decree, to the Political Chief of Upper California and Di-

rector of Colonization in Upper and Lower, in April, 1834, direct that he shall "*make beginning*" of his colonization labors, by "occupying all the Missions of both territories."

The restriction contained in section 17 of the Regulations of 1826, is of the same character as that in section 2 of the law of 1824, and both show that the term "colonization" is intended in its proper sense, and does not include grants or other acquisitions of the resident population. Lands appertaining to corporations and villages are held for the express purpose of distribution or grant, as will be perceived from the common sense of the thing, and from whatever Spanish or Mexican regulation for the formation of towns; yet they are as expressly excepted from "colonization" by section 2 of the law, as the lands occupied by the missions are in section 17 of the regulations; and for the same reason, namely, that they have another appropriation. The logic would be the same, therefore, which should say that in the towns and rural settlements of Mexico there were to be no more house and farming lots granted, as that which would preclude the "mission lands" (so to call them) from distribution, with this difference, that the land occupied by the missions are expressly reserved to the resident population, while the corporation and village lands are all inferentially so.

Further views of the points embraced in this question are given in the remarks on the next.

[Jones' Report, Senate Doc. 18, 2d Ses. 31st Cong., p. 6, et seq. Instructions of 1773 to the commandant of the new establishments of Monterey and San Diego, Jones' Report, p. 41; Regulations of 1781, titles xiv, xv, Arrillaga's Collection for 1828, pp. 162, 175; Jones' Rep., 44–50. Letter of the Viceroy of New Spain to the King, December, 1793, ib. pp. 51, 55; Collection of Decrees of the Spanish Cortes in force in Mexico, p. 107; Decrees of the Mexican Congress of 17th August and 26th November, 1833, Arrillaga for August to December, 1833, pp. 19 and 311; Instructions from the Central Government to Don J. M. Hijar, April 1834, Jones' Rep., pp. 11, 63, MS. Archives of California; Micheltorena's Proclamation, 29th March, 1843, Jones' Rep., 71, and MS. Archives of California; Reports of the Junta de Fomento de Californias, pamphlet, Library Dep't of State; Act of California Deputation, 12th May, 1834, MS. Archives; Appendix A C and D to this argument.]

The *second* point suggested by the Attorney General is what is called the *littoral* question, and is supposed to arise under §4 of the Mexican Colonization law of 1824, of which this is a translation:

> "The lands embraced within the twenty leagues bordering on any foreign nation, or within the ten littoral leagues, cannot be colonized without the previous approbation of the supreme executive power."

1. The question does not arise in the present case, because it is in proof that the land does not lie within ten leagues of the coast.* As for the position taken by the Law Agent, that it has been judicially proved in the proceedings *prior* to the grant, that the land does lie within ten leagues of the coast, and hence cannot now be disputed, I take the true doctrine to be this, to wit: that the inquiries and investigations made by the Governor, prior to the concession, are, in fact, in the nature of an inquest of office; that, as in any other inquest the *particular facts* reported, as for instance this one, of the ten leagues, are not conclusive of the fact, but that the *result*, which may be likened to a verdict or judgment, is conclusive; and the sum of the report, when adopted by the governor and acted on, becomes *res judicata*. It cannot be said, that each particular fact or opinion reported, is a fact judicially found, because (if for no other reason) the different functionaries to whom the subject was referred, might, and often did, make diverse reports: as in this case, one of the witnesses estimates the land to be a league and a half, another a league, &c. The particular facts and opinions, therefore, which are reported, are not to be taken as proved; and we cannot know what particular ones of them were received by the governor to determine his judgment that the grant was proper to be made. But the inquiry itself is to be taken, as before stated, as a judicial inquiry, in the nature, as held by the Supreme Court, of an inquest of office at common law, and its result—that is, the propriety of the grant—to be *res judicata*. In *Mitchell's case*, 9 Peters, 711, the claimant held under a grant from the governor of Florida, of lands that were in the occupation of the Seminole Indians at the time of the grant. The grant was conditioned, that the grantee should not alien the lands without the consent of the government. In 1817, the grantee applied to the captain general of Cuba for this consent. The captain general referred the matter to the assesor general of the province for his advice, and he reported that the lands had been lawfully granted, in full property; and upon this report, the permission asked for to dispose of the land was given. Before the Supreme Court, it was contended on the part of the United States, that the lands being Indian lands the grant was not within the functions of the officer making it, and was consequently void. The court held, that the proceeding before the assessor general was in the

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* The petition of the claimant in this case, to the Governor, soliciting the land, was referred, according to the custom of the time, by the Governor to the Ayuntamiento of Monterey, to report in regard to the locality and character of the land, the fitness and claims of the petitioner, &c. The Ayuntamiento reported, among other things, that the land was within the ten littoral leagues, concluding with the opinion, however, that it was proper to be granted. Proof taken before the Board, shows the report of the Ayuntamiento touching the locality of the land with reference to the sea coast, to have been erroneous. The Law Agent contended nevertheless, that by the report of the Ayuntamiento the question of locality was judicially ascertained and could not now be inquired into.

nature of an inquest of office, in analogy to the writ of ad quod damnum, which by the common law precedes the grant of any charter or patent by the King, and that the report of the assessor general being acted on by the captain general as on an inquisition at common law, the court would not go behind it, to presume that those officers had exceeded their powers. And more especially will the rule hold good in the present case as to the result of the inquiry when acted on by the governor, if it be good to the extent argued by the law agent. It was in view of the whole, and such *other matter* as he judged proper, that the governor acted and made the grant, as will be seen in the decree of concession.

2. The clause in the Mexican Colonization law of 1824, which prohibits lands to be colonized within twenty leagues of coterminous nations, and ten of the sea coast, is not intended as a general prohibition of grants of land; but refers only to *foreign colonization*, and is applicable to the *States* only, not to the Territories, of the Republic.

Mexico did not intend to leave her sea coast unpopulated—a derilict, open to foreign invasion, and the incursions of adventurers; or those settlements already established on the sea-board unstrengthened and unreplenished. The suggestion is too absurd to be entertained; and if it be contrary to every motive that can be supposed to actuate a government, it is especially contrary to the policy and wishes of the Mexican Government, whose immense extent of sea coast on the two oceans, and long line of exposed frontier on the borders of the United States, made her particularly solicitous for their population and defence. The statute books are filled with laws and decrees in encouragement of this object.

We shall better understand the policy of the law of 1824, if we consider the circumstances under which it was passed. Mexico after achieving her independence, stimulated by the prosperity and progress which she beheld in the United States, and anxious to strengthen herself against futher atttempts, then still apprehended, of subjugation by Spain, determined on a departure from the old restrictive ideas of the Spanish metropolitan government, and to adopt a liberal policy toward the people of other nations, as a means to replenish her sparce population by American and other foreign colonists. To this end was enacted the broad foundation of the colonization law of 1823, by the government of which the Emperor Yturbide was the head. (This law was enacted 4 January, 1823, and published in California 14 July, 1823.) On the abrogation however, of the consolidated government, and the establishment of the federative system, that law was suspended, and on its re-enactment 17 August, 1824, it appeared with the restriction under consideration, and other restrictions, prompted by jealousy of foreigners, and a desire to retain powers in certain particulars in the supreme government. The structure of the law exemplifies the mingled feeling of desire and distrust which actuated its framers: desire to strengthen the resources of their country by an infusion of foreign enterprise and energy, and distrust and jealousy, of the means by which it was to be effected. The motive of the restriction, however, by which the central government sought to retain in its own hands the control of so important a matter as foreign colonization of the sea coasts, is easily perceived; since through this sea board it must derive a large part of its revenue; through this only (or the border leagues which were included in the same rule) could it be attacked by foreign powers, or could foreign colonists combine with their former governments, or the states themselves combine with foreign powers or individuals against the integrity of the republic. But the same considerations that would lead to this distrust, and this restriction on the settlement of foreigners within the said leagues of the sea, would lead to the promotion and encouragement of settlements of native citizens. Hence, we shall find, how extremely solicitous the Mexican Government was to this end. To show that this was the cherished policy of Mexico, I will quote, first, a law of 6 April, 1830. This law (section 7) offers to Mexican families who will go to colonize the frontier States, payment of the expenses of the voyage, maintenance for a year, and donations of lands and agricultural implements. Section 13, opens for the encouragement of this emigration the ports of Galveston and Matagorda to the free introduction of houses and provisions. Section 12, permits the coast trade to foreigners for the space of four years, to facilitate the transportation of the effects of such emigrants to the ports of Tampico, Matamoras, and Vera Cruz; appropriates half a million of dollars for establishing settlements and fortifications on the frontiers, and conducting thither and sustaining on their arrival Mexican families and *presidarios*; forbidding at the same time the colonization of any part of those frontier States (not alone the ten or twenty leagues but any part) by foreigners of nations adjoining thereto. In pursuance of this law, the government in carrying into execution, made in repeated circulars and orders, the most liberal arrangements to facilitate its objects, and particularly to establish a settlement at Galveston. I refer to the Circular of 21 November, 1830, (Arrillaga's Collection, April to July, 1833, p. 136,) and the Regulation of 3 May, 1833, (Ibid, p. 132,) from which it will be seen that every means in the power of the Government, was adopted to effect the object spoken of. Again, the decree of 4 February, (1834, Arrillaga 1834, p. 47,) manifests a like solicitude, and proposes a large expenditure for (among other objects) the same great one of establishing Mexican families in the frontier State of Coahuila and Texas, and of "consulting the security of the frontiers," especially designating for such colonization the lands on the divisory line of the Republic. Again a law of 22 May, 1827, within three years of the date of the Colonization Law, and passed by a Congress composed nearly of the same members as that of 1824. This is a law for the *express purpose* of encouraging the formation, preservation, and increase of settlements on the coasts, and as it is short I will quote it:

> "1. The importation of lumber, free of duty, is permitted for the term of two years, for the sole object of forming, conserving or augmenting settlements on the coast, in the extent of twenty littoral leagues.
>
> "2. Are equally free of duties such national lumber (or, timber of domestic production,) as shall be directed to the objects of the foregoing article."

The statue book is full of such laws. One of Mexico for the organization of the civil militia, with provisons for defence of the ports and points on the frontiers; adopted 29 December, 1827. (Arrillaga April to July, 1833, p. 24.) Another of 8 May, 1828, for establishing six companies of permanent cavalry in Upper and Lower California; and distributing their respective forces, one company at San Francisco, one at Monterey, one at Santa Barbara, one at San Diego, one on the frontier of Lower California, and the 6th at Loretto. (Arrillaga, 1828, p. 118.) Now this military was intended for the protection and security of the inhabitants of the settlements, established and to be established; but the instruction attempted to be given to the 4th section of the Colonization Law, would separate the military from the settlements; place the latter exposed and defenceless in the interior, among the wild savage tribes; the former, isolated and useless on the coast. The absurdity of this suggestion is sufficient to condemn it. It was unity not division: strength not weakness; that the Mexican government was seeking in all these enactments. Again, the statute book is full of instances, for the exclusion of *foreigners* from the coast and frontiers. There is one of 30th April, 1828, directing all Spaniards living on the coasts of the Mexican gulf, to retire inland twenty leagues. The immediate cause of this decree was the anticipated approach of a Spanish squadron of invasion; but Mexicans were *not* ordered to retire, because, on the contrary, they were wanted on the coast to defend against the threatened danger. The 1st section of the law of 6th April, 1830, as already shown, prohibits settlements by foreigners of coterminous nations in any part of those States which should border on such coterminous nation. The law of 14th March, 1842, enacted to allow foreigners to purchase and hold real property, restricts them to within five leagues of the coast, and forbids their settlement in the states which border with other nations. In 1837 the agents of Mexico entered into a convention with her creditors in London, to appropriate a large part of her vacant domain to the payment of her debts, and to convert her bonds into land warrants. In 1839, this convention was ratified by the Mexican Government, but with such reservations as entirely to exclude from the frontiers and coasts the foreign emigration which the circulation of those warrants was expected to bring in: section 4 of the act of ratification, prescribing that the government should take care that the *frontier lands* should not be assigned to any subjects of coterminous nations, who might happen to get hold of the warrants ; section 5, that the premiums offered to the independent army (of the Republic) should be given in the lands of Yucatan and the Californias—the exposed territories of the sea board; that the concession promised to certain Indian tribes should appropriate the extreme frontiers ; and that the premiums to co-operators in the proposed recovery of Texas, should embrace the lands on the coast of the Mexican gulf, within twenty leagues of the sea. All these provisions are at once premiums on the settlement of the coasts and frontiers by Mexicans, and restrictive of their colonization by foreigners.

In California, a distinguished citizen, General Guadalupe Vallejo, was commissioned in 1835, to found a settlement on the northern frontiers and coasts of that territory, for the express purpose of arresting the progress and forming a barrier against the Russian settlements of Bodega and Ross, which appointment, and the proceedings under it were approved by the central government in 1839, and the desire expressed that the settlements should continue to increase "for the object mentioned." These documents are contained in the papers accompanying my report on the subject of Land Titles in California, Senate edition, page 81. These documents also illustrate both positions, viz: that, the restriction was aimed at foreigners alone ; and that settlements of native citizens was an object of encouragement and solicitude.

All these, and many other acts which I might enumerate if it were necessary, exemplify the policy of the Mexican Government, which led to the 4th section of the law of 1824; and show that that policy was to draw colonists from foreign countries, into the interior; and establish native settlements between them and adjoining nations, and between them and the sea coasts; and this being so evidently the policy of the law, why shall we go behind it to interpolate an absurd proposition contrary to it?

Having, as I think, shown what was the policy of the law of 1824, I now invite attention to the proper construction of it by its own terms.

The subject of the law is declared in its title, to wit, *Colonization*, and colonization implies *immigration*, and does not apply to a native or resident community. There may be domestic colonization, as a colony coming from another part of the same nation; but the word necessarily implies immigation of some sort, and the first section of this laws shows what kind of colonization is here intended, namely *foreign colonization.*

The subject, then, being *Colonization*, the first section of the law declares what class of *persons* is intended to be embraced in this colonization. The second section declares what description of *lands* are embraced in it. The third section directs the Congresses of the several States to make their particular rules for the regulation and reception of that colonization. The fourth section restricts the power of the States with respect to such colonization (without the previous approbation of the federal executive) in certain portions of their territories. The fifth section still further restricts the power of the States in the same particular, by authorizing the federal government to make reservations for public purposes. The sixth and seventh sections are designed to assure foreigners who may propose to avail themselves of the offers of the law, of its permanency and of good faith in its administration. The 8th section is a reservation on the part of the government of a right, notwithstanding the preceding, to take measures for the security of the federation as against those foreigners who may be admitted to colonize.

The ninth section is the first one that speaks of Mexican citizens, and this, and the two following sections, are inserted in this connection, in my opinion, as a limitation to the colonization spoken of in the preceding ones, and are intended to declare that foreign colonists shall not be admitted to the prejudice of the objects expressed in these 9th, 10th and 11th sections. And here I ask attention to the change in the phraseology of the law, which occurs at the introduction of these sections. In all the preceding sections, *colonization* is spoken of, and *foreigners* are the persons alluded to. At the 9th section, the term colonization is dropped, and the *distribution of lands* spoken of. And, this, for the good reason that to have employed the term *colonization* in reference to the subject matter of these sections would have been an absurdity. Yet it is *colonization* only, as referred to in the 1st, 2d and 3d sections, and not the *distribution of lands* spoken of in the 9th, 10th and 11th sections which is restricted by the 4th section, within the twenty limitary and ten littoral leagues, and I submit that when foreign colonization is the subject matter of the law, and the whole subject of one part of it, and the distribution of lands to citizens is prescribed in another part of it, and a prohibition is inserted in connection with those sections which treat exclusively of colonization, and the prohibition expressly mentions colonization, and does not mention the other, that other, that is the distribution to citizens, is necessarily excluded from its operation. "*Expressio unius est exclusio alterius* is a universal rule in the consruction of statutes." Arredondo's case, 6 Peters.

To continue the analysis of the law. The 9th section is the first in which Mexican citizens are referred to, and this prescribes as a limitation on the operation of the preceding ones, that the distribution of lands to citizens shall have preference over the colonization which those preceding ones treat of, and then directs the rule which shall govern that distribution. The 10th and 11th sections treat also of the allotment of land to Mexican citizens, military and others, who may have become entitled thereto by special services or contracts. And here if we refer again to the decree of 4th February, 1834, we shall find that the classes of persons treated of in these 10th and 11th sections of the act of 1824, are the very classes whose settlement on the frontiers was most desired. The 12th, 13th and 15th sections lay down some general rules apparently intended to apply to all subsequent acquisitions from the public domain, and accordingly their phraseology applies to all titles however derived. Section 14 is for a further assurance of the colonization contracts treated of in the beginning. The 16th and last section will be noticed in a subsequent branch of the argument.

Another point of view in which we may look at this law, is this: as prescribing rules for the distribution of the public domain in three diflerent channels: namely by foreign colonization; by gratuitous distribution to citizens; by distribution to citizens in discharge of government obligations. In the rules prescribed for foreign colonization, the restriction is inserted; in the rules prescribed for the other modes of distribution it is *not* inserted. By what ingenuity, and to what end can the law be tortured so that the prohibition can be supposed to apply where it is expressly omitted, and where it would defeat its express intent?

But besides being only applicable to foreign colonization, and not to the distribution of lands to citizens, the clause had no relation to the *territories* of the Republic, only to the States; the scope and object of the law is to prescribe general rules and principles to govern the particular Colonization Laws which were to be adopted by the Congresses of the States. Looking carefully through the law, we shall find that the territories are but twice mentioned in it, namely, in the 11th section, where it is enacted that a certain class of public burdens shall be borne by the lands in the territories, as a counterpoise to other public burdens which are required in section 10, to be borne by the lands of the States; and again in section 16, which requires the government, (meaning the federal executive,) to proceed to the colonization of the territories. In addition to this, if we examine together the 3d, 4th and 5th sections of the law, we shall find that they all refer to the same lands, and these the lands of the States. Section 3 requires that the Congresses of the States, to the end expressed in the two previous sections, shall form Rules for Colonization within their respective limits. Section 4 prescribes that without the assent of the federal executive, lands within the twenty limitary and ten littoral leagues shall not be colonized; that is, as I interpret it, shall be excepted from those rules which the States in the preceding section are required to adopt; and section 5th fixes that interpretation, because it enacts that for the purposes therein mentioned, the federal government may reserve and use portions of THOSE LANDS—*estos terrenos*—that is, of the lands immediately before mentioned, and which must mean lands of the States, since it would be idle to enact that the federal government might reserve lands for public uses in the territories, when the territories were held as its own property. But again, section 16 makes it the duty of the federal executive to proceed to the colonization of the territories. To what end enact in the 4th section that certain portions of the territories should not be colonized without the consent of the federal executive, when the 16th section refers the whole business of the colonization of the territories to the same executive? This last section of the law of 1824, in my opinion, necessarily withdraws the laws of the territories from the operation of the restriction contained in the 4th section; since if no part of the territories could be colonized without the previous approbation and consent of the executive, of course, the ten littoral and twenty border leagues could not be. He is no more charged with the colonization of one than of the other.

We shall arrive certainly at this conclusion if we consider what is the effect of this 4th section. It is in the nature of a restriction on a general permit, and its object and effect is to limit the discretion of some one—of some one, to whom the duty of colonization was confided. Now, the duties of colonization in the States, was confided to the Congresses thereof; and the duties of colonization in the territories was confided to the federal executive. The 4th section is not intended to limit the discretion of the latter, for, on the contrary, it enlarges his powers; it is, then, intended to limit the discretion of the Congresses of the States, and of course can only apply to the States.

Under the general law, foreigners were never permitted to settle or own property in the Spanish American possessions, and until the Colonization Law of 1823, before spoken of, there had been no such thing known in the provinces composing the new empire of Mexico. The gratuitous distribution of land to native born subjects, however, was no new idea, and required no new laws to authorize it. It was a faculty inherent in the executive office, and had been constantly exercised for three hundred years, by the chief political authority, wherever there was a Spanish province. It had been exercised by the Viceroy of Mexico, and every chief of province under him since the conquest. The Colonization Law, therefore, was not intended to create that power; and hence the distribution of lands to citizens is only incidentally mentioned, as a restriction on the new faculty created, namely, that of granting to foreigners. The federation did not pretend to own the vacant lands of the States, and did not attempt or pretend to regulate the mode of distribution to citizens. The States had already all the powers over them, that were given by proprietorship, and were consistent with the general laws of the Republic. There are repeated laws in which this right of property of the States in their vacant lands is expressly recognized. I will only refer to that of 6 April, 1830, and that of 25 April, 1835. It was not competent, then, for the General Government, even had that been its design, to limit the authority of the States in the uses of their domain according to the existing policy and laws, nor to take away functions already possessed by the States. It could not limit or control their right to distribute and grant lands to their citizens, because that was a function already possessed by the States, and consistent with the policy of existing laws. But in introducing a new law, connected with the exterior policy of the country, which was peculiarly in the province of the Central Government, it might well and properly prescribe limits to the privileges of the States in respect of it, and reserve to itself such part of its management as it judged expedient.

The first act to admit foreigners to settle and hold real estate in Mexico, was that before mentioned of 4 January, 1823. It contains no other restriction than that natives of the country, and particularly the military, shall be preferred in the distribution of lands. The ten league restriction was not necessary in this law, even if the same policy and ideas prevailed, because under it—the federative system not then existing—the whole administration of the law was in the hands of the central executive; and it would have been as idle to enact in that the restriction of the 4th section, as now to interpret that 4th section to apply to the territories.

The Colonization Act of 1823 was followed 7 October, same year, by an act to repeal all the laws which prohibited foreigners from holding shares in mines. This was adopted to procure the introduction of foreign capital for the resuscitation and rehabilitation of old mines.

Next followed the Colonization Law of 18 August, 1824, introducing the restrictions we have noticed.

Some other restrictions are introduced in the passport and naturalization law of 12 March, 1828, as also some additional privileges. This law also (section 9 and 10) in establishing a new law, partly to be administered by the States, adopts certain rules to govern that administration. Those sections provide that unnaturalized foreigners may propose for the purchase and colonization of lands of private ownership, but to obtain the privilege, must have the special permission of the General Congress, if the purchase and colonization should be in the territories, and of the particular Congresses, if in the States; that the particular Congresses might give this permission or not, as they chose, and impose such conditions as they thought proper; but stipulating the following which should serve as a basis for every contract of the kind, with the understanding that the legislatures might narrow them but could not amplify them, to wit: 1. That the fourth part of the colonists should be Mexicans. 2. That within seven years the estates should be divided into small tracts. 3. That the empresario not naturalized should not reserve a tract exceeding sixteen square leagues, and that this should be sold within twelve years, counting from the time in which the estate ought to be divided.

The next law touching the subject is that of 14 April, 1828, prescribing rules for letters of naturalization, the 13th and 14th sections of which enact, 1. That every empresario who comes to colonize, in accordance with the law of the State where he may settle, shall have a right to ask for a letter of naturalization, which shall be conceded to him, he taking an oath of obedience to the Constitution and Laws. 3. That colonists who come to settle the colonizable lands shall be held as naturalized at the expiration of one year from their establishment. These sections relate of course to persons who may come in under the Colonization Laws, and show the sense in which the term colonists is used.

The 11th article of the act of 6 April, 1830, as already shown, again makes a very material restriction, that of prohibiting the States which border with other nations from colonization by citizens of such coterminous nations.

The act of 21 November, 1833, repeals that restriction.

The act of 25 April, 1835, makes another very material restriction, no less than forbidding absolutely the States of the frontier and of the sea coasts from aliening their lands for the purpose of colonization until rules should be established to govern it.

This section, again, shows the sense in which the term colonization, in the Mexican law, is to be understood; for it cannot be supposed that in this enactment the Mexican Congress intended so suicidal a policy as to stop *all* acquisitions of land from the domain of the border States; but the object of the law was to prevent their settlement by emigrants from abroad. The point, however, does not stand on this hypothesis alone; it is demonstrable, that the terms are used both in the law under consideration, and in that of 1824, in regard to immigration alone, and that foreign immigration. The following is the section entire:

> "In use of the power, which the General Congress reserved, in article 7, of the said law of 18th August, 1824, the border and coast States are prohibited from alienating their vacant lands for the purpose of colonizing them, until rules shall be estab-
> Congreso general en el art. 7° de la citada ley de 18 de agosto de 1824, se prohibe a los
> lished which they shall observe therein." ("En uso de la facultad que se reservo el
> estados limitrofes y litorales enagenar alguna parte de sus terrenos valdios para colonizar en ellos, hasta que se establezcan las reglas que deben observar para hacerlo.")

Now the faculty reserved by the General Congress, in said article 7, law of 1824, in exercise of which the above section is enacted, extends only to the right of prohibiting the entrance of foreigners—"*la entrada de estrangeros*"—for the purpose of colonization. It does not reserve the right to prohibit grants to citizens; and we must interpret the power exercised, with reference to the power reserved; and conclude that the term colonization, as understood by those law makers, was equivalent, in the act of 1835, to the term "entrance of foreigners to colonize," in the law of 1824. Again, in the section quoted from the law of 1835, the prohibition is not against the *alienation* of their lands by the States mentioned, but against their alienation, *for the purpose of colonization;* and the latter branch of the provision evidently qualifies and limits the former.

The restriction contained in the 4th section act of 1824; that contained in the 11th section, act 6th April, 1830, and that contained in the law under consideration, of 25th April, 1835, must be understood as of the same subject matter—as relating to one and the same thing; the first named, as restricting foreign colonization within ten leagues of the seacoast, and twenty of border nations; the second as prohibiting the colonization by emigrants from border nations of the States with which such nation bordered; the third as prohibiting any foreign colonization of the border and coast States.

To resume our summary of the fluctuations of the law in the particular under consideration.

The act of April 4, 1837, revives the restriction contained in that of April 6, 1830.

The decree of March 14, 1842, again extends the privileges of foreigners in regard to rural property, and, with the exception of the border and coast departments, gives them nearly the same rights as citizens in the acquisition of real property. The 9th and 10th sections of this law I invite particular attention to, and assert, without hesitation, that, taken in connexion with them, the 4th section of the law of 1824 will not bear the interpretation attempted to be given it on the part of the United States.

The 9th section provides that the provisions of the law—that is, the extension to foreigners of the right to hold real estate—shall not include the border departments, with respect to which special laws of *colonization* shall be issued, provided that foreigners shall never be able to acquire property in them, without the express license of the supreme government of the republic.

Section 10 provides that in those departments which are not border, but which have coasts, foreigners can only acquire lands at a distance of five leagues from the coast.

The restriction contained in these sections are, in my opinion, to be taken as a part of the same system of legislation as those quoted of 1824, 1830, 1835, and 1837, and the general term *colonization*, as used in the 9th section, must be understood solely in connexion with the introduction of foreigners and the acquisition by them of real property, and the provision with which the section closes, that in the border States foreigners shall never be permitted to acquire lands without the express license of the federal executive, is only re-enacting in a larger extent, and with additional rigor, the restrictions of 1824.

The 18th section of the colonization law of 1823, and the 9th section of that of 1824, both provide specially that, in the distribution of lands, *Mexicans shall be preferred*—that is, be preferred over foreigners This is also consistent with common sense, since every man, in the distribution of favors, prefers his own household, and every nation its own citizens; and none more than Spain and Mexico, under whose laws the admission of foreigners to hold real estate is an exception, not a rule. But if the construction now sought to be given to the 4th section of the law of 1824, be correct, and it was intended to embrace both foreign colonization and grants to citizens, and to embarrass and restrain both alike, then by the operation of the law of 1842, instead of citizens being preferred, a discrimination is made in favor of foreigners; because, if the 4th section, law of 1824, applies both to foreigners and citizens, then both are restrained from acquiring lands within ten leagues of the sea; and the law of 1842, without any reference to citizens, or any concessions in their favor, admits foreigners to acquire within five leagues of the sea. The conclusion is inevitable, that, to the minds of the makers of the law of 1842, no such construction of the law of 1824 had occurred; for it is plain (if any argument be needed to such a proposition) from the whole tenor of the law of 1842, that, though it was framed for the purpose of enlarging the privileges of foreigners, it was not intended that they should enjoy the same license as citizens, much less be preferred to them. Thus while the first article prescribes that foreigners, residing in the republic, may acquire real property by purchase, adjudication, denouncement, or whatever title established by the laws, the third section provides that they shall not acquire more than two tracts in any one department, without license of the supreme government, and section 8th provides that the foreign proprietor, who shall absent himself with his family two years, without license from the government, shall make sale of his estates, or otherwise the government will proceed to sell them; both being restrictions that do not apply to citizens. Again, section 9th, as already shown, provides that the privileges given in this law to foreigners, shall not apply to the border departments, and even makes a perpetual rule that foreigners shall not acquire lands in those departments without special license of the supreme government—a disability that certainly does not apply to citizens. Again: the 9th and 10th sections taken together, and with the supposition that the construction given by the Attorney General to section 4th (law of 1824) be correct, would involve this absurdity—that in the border departments foreigners were entirely excluded, while in the coast departments they were preferred over citizens.

The law of 1824, according to my understanding of it, may be paraphrased as follows:

The Mexican nation offers protection to the persons and property of foreigners who come to colonize within it, and for that purpose opens those lands of the Republic, which not being private property nor pertinent to any corporation or pueblo, may be colonized. To this end, as far as the States are concerned, the Congresses thereof shall make the necessary rules for the administration of this law within their respective limits; but they shall not administer it with regard to the lands which lie within twenty leagues of any other nation, or ten of the sea coast, without the consent of the federal executive, and if the federation should find it necessary to reserve any portion of those lands for public uses, it may do so. The nation undertakes, in further pursuance of the objects of this law, that within four years no duty shall be imposed on the persons of foreigners who come for the first time to establish themselves in the nation; nor prior to the year 1840 shall the general congress prohibit the entrance of foreigners to colonize, unless under imperious circumstances with respect to the citizens of some particular nations; nevertheless the government may take such measures of precaution as it judges proper for the security of the federation against foreigners who come to colonize; furthermore, in the distribution of lands, Mexican citizens (who have heretofore had the exclusive right) shall still be preferred; and the colonization herein provided for shall not be so extensive but that soldiers who are entitled to bounty lands may receive them in the States, and other public servants with whom the Government may be able to compromise for lands, may receive them in the territories; nor shall there be united (under this law) in one hand, more then eleven leagues; nor shall the new settlers transfer their property in mortmain, nor hold it themselves, if they reside out of the Republic. Conformably to these principles, the government will proceed to the colonization of the territories.

From all the numerous laws which I have quoted, it will be seen that the Central Government of Mexico has always claimed and exercised control over the whole matter of the acquisition of real property by foreigners; to license or to forbid it, and to prescribe rules to regulate it. The books are full of legislation to this point; the law of 1824; the 11th section of that of 1830; the whole of that of 25 April, 1825, are samples of it; and the 12th section of that of 1842, above quoted, shows the Central Government so tenacious of this right, that, while it gives extensive privileges to foreigners in respects to the acquisition of lands, yet provides that they shall not be able to avail themselves of those privileges in any of the Departments, unless they contract with the government that "it possesses the right in representation of the Mexican nation."

But while this right of control over settlements of foreigners, and of ther acquisition, in whatever way, of real property, has been thus constantly and jealously exercised by the Central Government, I have not found a single law in which that government has attempted to interfere with the discretion of the States (or of those Deparments which, prior to the breaking up of the federation in 1835, were States,) in the disposition of their vacant lands for domestic occupation, or of any of the laws of real property as between citizen and citizen. Upon what ground can the 4th section of the law of 1824 be wrested from its position in this general system of legislation, and forced to apply to a subject over which the makers of it never claimed any control?

I shall now endeavor to show, that the same view which I have expressed of the effect of the 4th and 16th sections of the law of 1824, was taken by the federal executive of Mexico in the regulations of 1828. Those regulations give there in advance the express consent and direction of the federal executive to all kinds of grants to all kinds of persons (embraced in the law,) in all parts of the territories, inside and outside of the littoral and border leagues, and appoint agents to carry out that express consent and direction, reserving only for a special review and permission that particular class of grants which I contend alone come within the purview of the 4th section of the law of 1824, to wit: grants to empresarios or contractors for bringing in foreign colonies; and providing only that they be vacant lands, and (for purposes of colonization) not occupied by Missions. Within or without the littoral and border leagues, the federal executive very properly reserved a right of review and negation on each particular grant made for the object of a foreign settlement; and having made this reservation in one class of cases, it is necessarily inferred that in every other class mentioned in the regulations the consent therein given was full and unreserved.

Whatever view, therefore, may be taken of the force of the restriction contained in the 4th section of the law of 1824; whether it be conceded that such grants as the one at present before the Board were not embraced in that prohibition, or whether it be determined that Cruz Cervantes, born here on the soil and living on it ever since his birth, became suddenly a *colonist*, when he petitioned for a piece of land; whatever view may be taken of the reach of that section, its demands were fully complied with; because the consent of the federal executive was all that was necessary; and that consent was given in the instructions, without restriction as to the locality, and to every description of grants, except those to empresarios; and the rule already quoted, that the insertion of one limitation excludes all others, applies and settles the construction.

The act of 1824 requires that Mexicans shall be *preferred* in the distribution of lands, and, as between them, residents in the place where the lands lie. The Regulations of 1828, were, doubtless, therefore, intended, in a large degree, for the benefit of the resident inhabitants of the territories. Now, as far as California is concerned, if the regulations were only intended to operate outside the ten leagues, it would have been worse than a dead letter. The whole population lived on the sea coast; they were not strong enough to send out colonies or branches into the Indian territory; they rather needed nursing, strengthening and replenishing; and any contrary policy, such as holding out allurements for the emigration of the young and enterprising into the interior valleys, would have provoked an Indian war for which the territory was not prepared, and would probably have broken up the few struggling settlements that were there. The law was intended to have a practical, beneficial operation; to give the people of the country a chance of obtaining lands where they wanted them, and where they could use them; to keep families and settlements together, and give them a chance to grow; not to break them up and scatter them; to confer benefit, not to bring destruction; to populate and advance the country, not to lay it waste; and if, indeed, there be an ambiguity (which, for my part, I am not able to discern, however,) in the terms of the law, it is the duty of Courts, in the language of Judge Marshall, (1 Peters, 95,) in a not dissimilar case, to adopt that construction which would confer the bounty intended, and effect the benevolent intention of the legislature.

The Regulations of 1828 are entitled *General Dispositions*, not local or partial; Regulations for the Colonization of the Territories—all the terrirories, not parts of them.

The preamble gives the reason for the adoption of the rules, namely, because the 16th section of the law of 1824, makes it the duty of the Government to proceed to the colonization of the Territories—all the Territories, not portions of them—and shows that the powers therein intended to be exercised were co-extensive with that given in said 16th article.

The 1st section authorizes the Governor to make concessions—what of? "vacant lands of their respective territories," without restriction as to locality, and under a law which provides for all parts of the territories.

Section 7 reserves one particular class of cases; and this being the only reservation, it cannot be questioned that, with this exception, the President delegated his power as fully as he received it.

It would be more rational, more in conformity with the object of the law, and of those Regulations, in my opinion, to say that they were intended to apply *only* to the ten littoral leagues, than that these were excluded. More especially, if we view them in connection with the different laws for establishing the military, and with the Order of 1838, authorizing grants to be made of the islands of the coast. The military posts were all on the coast; and when the islands should be granted, and the present interpretation of the law be carried into effect, the country would present this curious spectacle—the islands populated; the sea coast in a width of thirty miles deserted, except three or four starving companies of military; and the settlements fighting for life with the Indians of the interior. How is this absurdity to be got over? how is this incongruity to be reconciled? I am curious, indeed, to hear, why, if an apprehension of foreign adventurers seizing the islands, induced the President to authorize the granting of them to citizens, the same apprehension should not induce him to authorize the peopling of the coasts in the same way? I am curious to hear, what "commerce and fisheries" they were which were to be endangered by foreigners seizing the islands, if nobody could rightfully or lawfully inhabit the country of the sea shore? I am curious to know why ports were opened here, and custom houses established, unless the officers of the customs were charitably intended to console the military, in their solitude.

Is it not plain beyond doubt, that no new permission was considered necessary to authorize grants to citizens on the sea coasts; or that it would have been given for the same reasons, infinitely stronger, along with the authorization for granting the islands?

Again, these Regulations embrace all the Territories; and may be supposed to have been intended to operate in all of them. But, if the littoral leagues were excluded, we have seen how little operation they could have had, in Upper California: in Lower California, they could have had none at all, unless it was intended that the inhabitants should desert the little valleys of the coasts, where alone, in that country, the means of life are attainable, in order to partake of the government bounty by a grant of land on the summits of arid mountains.

But, under all circumstances, and under whatever view of the general provisions of the Regulations of 1828, I contend that the claimant in this case is secured and his rights recognized and provided for in the 17th section, alluded to in a former part of my argument, and which I again quote:

> "In those Territories where there are Missions, the lands which they occupy shall not now be colonized, and until it be resolved whether they ought to be considered as property of the reductions of the neophyte-catechumens (communities of converted Indians) and Mexican settlers (or inhabitants.")

I do not know what construction the attorney general proposes to give this section; but to my mind it affords conclusive evidence that the government discriminated, and intended to discriminate specially between colonization, properly so called, and concessions of lands to native settlers or inhabitants, and to recognize, at least for the present, the rights of the latter, to the exclusion of foreign colonization, in the lands occupied by the Missions. In a legal point of view, the Mission lands were undoubtedly the property of the nation; but a doubt if they ought not to be appropriated to the exclusive use of those classes who had worked them and protected them, led most properly to their reservation from colonization. The distinction is indeed drawn, in so many words, in this section, between the people of the country and colonists, and by all just rules of construction (to say nothing of the signification of words) forbids the confounding of the two. I construe the section, in connection with the other parts of the law, to mean, that while grants of all kinds mentioned in the first section might be made in the Territory generally, yet in the lands occupied by the Missions, colonization grants should not at present be made, nor until it was determined whether others than the Federal Government had not a property in them. What else can the section mean? It forbids colonization in those lands, certainly; but in the very act of prohibition recognizes the rights of native inhabitants; how were those rights to be protected except by grants to persons whose rights are thus reserved? This 17th section alone has always seemed to me to afford a conclusive construction to the act of 1824, and of the meaning in which the word colonization is used in it; and a complete answer to whatever might be said in support of the view of said 4th section taken by the government attorneys. What else can the distinction mean which the section makes between colonization and the rights of native settlers? What else, but that colonization is forbidden, in order to protect more completely those classes of the native population?

We need not, however, rely alone upon the Regulations of 1828, nor upon the protection which the 17th section was intended to afford, to persons like the claimant. Whether or not, the Regulations of 1828, give consent to grants within the littoral leagues; whether or not, colonization and grants to children of the soil mean the same thing; whether or not we receive the protection which the 17th section was intended to secure to us; there are abundance of other laws and executive orders which come to our aid. The act of August 17, 1833, providing for the secularization of the Missions of the two Californias, enacts, among other things, that all the lands of the Missions, except a cemetery and a lot of two hundred varas square for the use of the curate, should be turned over to the administration of the civil authorities. Now the mission lands were all located on the sea coast, or within a few leagues of it; and the secularizing of those lands and turning them over to the exclusive jurisdiction of the civil authorities, could be for no other object than to facilitate their conversion into private property, according to the principles of the secularization law of 1813, before quoted.

The act of November 21, 1835, repeals the prohibition contained in the 11th section of the act of April 6, 1830, which forbids the colonization of the border States, by inhabitants of the nations adjoining, and then enacts that the government may expend whatever amounts may be necessary in the colonization of the territories of the federation, and all other vacant places it may have a right to colonize, and as a part of this authorization includes the erection of fortresses on the frontiers. The scope of this law, then, embraces the whole extent of the border States, and all the territories, and authorizes the colonization of the latter (without exception as to locality,) under the sanction of the highest legislative act.

This general act was followed on the 26th of the same month, by a particular one, applying to the very locality in dispute, namely, the ten littoral leagues of California. This law empowers the government in so many words, to prescribe whatever measures will assure the colonization, and make effective the secularization of the missions of Upper and Lower California. And in pursuance of this authorization the government sent a special agent, with the office of political chief and director of colonization, and instructions to "make beginning," under the law, by occupying all the missions of the two territories. Now every mission of both Upper and Lower California was within the ten littoral leagues, and consequently, whatever lands the instructions of 1828 embrace, the present law and instructions cover the exact locality in question, and no other; and give the special assent, both of Congress and the executive to its colonization. The person to whom this appointment was given, and instructions were delivered, was superseded in his principal office, before he had an opportunity to enter on its duties. But neither the law, nor the instructions were ever rescinded, but were in force as long as the Mexican government existed in California.

Again, the instructions to General Vallejo, before noticed, to promote the settlement of the northern frontier, contemplate grants on the seacoast. They were given by Figueroa, without reservation. They were subsequently approved, as well as all proceedings under them, and General Vallejo encouraged to continue in the same labors, by the General Government. All this, without a word on the subject of the coast leagues, which would have been remarkable had it occurred to the General Government that Figueroa and Vallejo had been transcending the law in that particular.

I maintain, therefore, that the approbation and consent of the Central Government was given to the settlement of the coasts of California, in each and all of the acts I have quoted to that point, as fully as is possible for assent and approbation to be given.

During my discussion of this question before the Commission, my attention was called by a member of the board, to the first section of the Regulations of 1828, and to the fact that in that there does not appear to be any distinction made between citizens and foreigners, and hence it might seem to contradict my argument, that the law of 1824, on which the Regulations are founded, makes such a distinction. I have, therefore, taken occasion to examine the section with care, to ascertain whether in fact, it does operate against the view I had taken of the 4th section of the law of 1824, and I think it assists, rather than hurts my argument.

The construction which I put upon the law is this: that in the States the several Congresses had entire control of colonization, subject to the limitations of the law, in all their domain, except within the ten coast and twenty border leagues; that within those ten and twenty leagues, they and the federal executive together had that control. That in the territories, the federal executive alone had (under the law,) full control; because, if the 4th section applies to the territories, it still gives the control to the federal executive, and the 16th section confides the whole subject matter, within the territories, to his discretion.

Now, in the States, the Congresses alone might provide for colonization in the interior, and on the coasts and frontiers with the consent of the federal executive; consequently, the federal executive alone might colonize all parts of the territories, and that with either foreign or domestic colonization. Hence, the first section of the Regulations of 1828, will admit of either of these views, both of them in harmony with the opinion I have expressed, namely: If the Governor should understand the law as a prohibition against grants to foreigners on the sea coast, then he would suppose his instructions to be in pursuance of the law, and construe them thus: you may make grants both to citizens and to foreigners, that is, to citizens in every part of the territory; to foreigners where by law they may hold, at a distance of ten leagues from the coast; there is land applicable to both. Or the instructions may be construed thus: the President had full power over the subject of colonization, whether foreign or domestic, and without regard to locality, in the territories, and was willing to delegate the whole discretion which he had over the subject, to the political chief of his apppointment, except so far as he reserved it, and hence to say: you may grant lands in all the territory of California, to all persons who under the existing laws may receive grants; you may grant to empresarios, to families, to single persons, Mexicans or foreigners; this is what is confided to me, under the law, and what I confide to you, except as hereinafter reserved.

In my opinion, the latter is the proper interpretation of the law and instructions. That the law gave the President absolute power over colonization in the territories, subject to the general provisions of the law, and that he delegated this power as fully as he received it, with the exception of the reservation in relation to empresario grants or contracts. It will be borne in mind, that only naturalized foreigners could hold land in the Republic, except they came as *colonists*, properly so called, under the lead of an empresario; and hence there would not seem to be any necessity or propriety in making a distinction in the authority conferred on the governor, between natives and foreigners in regard to private grants; (I use the phrase private grants in contradistinction from empresario grants;) foreigners being understood here as *naturalized* foreigners, since no others could obtain private grants. This will be seen by the 6th section of the naturalization law of March 12th, 1828, which says, that foreigners who establish themselves in the nation, according to the rules prescribed, or to be prescribed for their admission, shall be under the protection of the law, and enjoy the civil rights of Mexicans, with the exception of acquiring rural landed property, which according to the laws in force, those not naturalized cannot obtain.*

I do not think it was individual grants that the government was ever jealous of. I think it was of empresario or colonization grants, properly so called; that it was against these that the 4th section of the law of 1824, was intended to apply. The government could have no occasion to be jealous of grants to individuals; but they might well be jealous of, and wish to guard with extreme care, great empresario grants, covering many millions of acres, (there was one in Texas of forty-five millions of acres,) and intended for the introduction in compact settlements, of thousands of foreign families, more or less clannish, and likely at any time to set up for themselves.

The whole difficulty in the interpretation of this law, has arisen from a confounding of terms—from mixing and confounding things and words which have no affinity. Laws are always framed with reference to other laws, and to facts, ideas, customs and habits of thought already prevailing; and it cannot be expected that a foreigner can take up a naked statute, and by intuition transport himself into the position of the framer of it, and know every thing on which it was founded, so as to give it at once a correct interpretation. Our own statutes are often difficult to interpret, with all our knowledge of their intended operation, and of the reasons and circumstances of their enactment. How much more so must be the statutes of a foreign country, in a foreign language, and adapted to a policy and ideas not less foreign to any views we have ever entertained; and when we come with this our limited knowledge of them, to measure rights by them, and to determine the fortunes of individuals, families and communities, how necessary labor, patience, attention, caution; and how proper to take the largest and most liberal view they will admit of.

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*The laws in force in 1828, as above shown, were modified by Article 13, of the First Constitutional Law of December 15, 1835, and of December 29, 1836, so that foreigners married to Mexican women, (as well as naturalized foreigners,) might also acquire fixed property. The article is as follows:

Article 13. "The foreigner cannot acquire fixed property in the Republic, if he be not naturalized in it, marry with a Mexican woman, and conform himself to the other requisites prescribed by the law relative to these acquisitions. Neither can they transport to another country their moveable property, except with the requisites and paying the quota which the laws establish. *The acquisitions of colonists shall be subject to the special rules of colonization.*"

Can anything be clearer than the distinction here made between acquisitions by purchase, &c., and acquisitions by colonists and colonization, and that the laws do not intend to confound the two?

It was not necessary to say in the instructions of 1828, to the political chiefs, in authorizing you to make private grants to foreigners, you must understand *naturalized* foreigners; that was already explained in other laws. Yet, if we were for the first time to read those Regulations, and jump hastily to a conclusion, we should say that the section made no distinction.

I think the federal executive had a right, under the law, to grant lands, or cause them to be granted in all the territories, first to native citizens; second, to foreigners; private grants to naturalized foreigners; empresario grants to natives, and to foreigners, whether naturalized or not; that if the 4th section of the law of 1824 applies to the territories, that then he obtained his power over the subject matter, within ten leagues of the sea, from that section, and his power over the remainder from section 16; that if the 4th section does not apply to the territories, that then he obtains full power in the premises from section 16. In either case, and with either interpretation, he has full administration of the law of colonization in the territories. That he delegated that discretion, as fully as he himself received it from the law, whether from the 4th section, or the 16th section, or both, with the single exception of empresario grants to which he reserved, in accordance with the spirit of the law, a special examination and consent. I say in accordance with the spirit of the law; for, though he might under the terms of the law, have delegated fully his control over that as well as other points, yet it was in the spirit of the law, that these grants should only be given under the highest sanction, and he might well think them too weighty and too responsible for final determination by an inferior officer. It was one of those precautions, which, under the 8th section of the law of 1824, it was his duty to take for the security of the nation with respect to foreigners who should come to colonize it. And we shall see the propriety of this reservation the more plainly, if we reflect that no certain rules could be laid down to embrace colonization contracts, but that each would have its special circumstances and conditions which the President would naturally desire should pass under his supervision.

It was also suggested in remarks in the course of my argument before the commission, that grants to citizens and foreigners were alike made under the law of 1824, and hence would seem to refute the distinction which I drew between colonization and grants to resident citizens.

Undoubtedly, the colonization law makes some rules applicable to all subsequent acquisitions from the public domain, and hence in some particulars, it applies to individual as well as to colonization grants. And so, undoubtedly, the Regulations of 1828, do combine in a general order, directions for both species of grants, and would seem, without a careful examination, to confound the two under the general term colonization. But I think a careful examination will show that throughout both the law and the Regulations the discrimination is constantly observed.

The President was to colonize the territories according to the principles laid down in the law. One of those principles was that Mexicans should be preferred in the distribution of lands. Hence, in adopting general rules, the necessity and propriety of making provision for the observance of that principle; and hence the propriety of saying, in general terms, that grants to individuals as well as colonization grants are made under those laws and rules; though it will be observed that those laws and rules are never referred to as the sole law of the subject.

In the preamble the President says, he dictates these rules in order to give the most *exact fulfilment* to the law—of course the whole law; and hence those provisions which apply to individual grants must, in my opinion, be referred to those sections of the law which are inserted for the protection of the people of the country. The President adopts rules for colonizing the territories, in exact fulfilment of the law. He could not fulfil the law without, at the same time, making provision for grants to citizens.

The word *colonize*, in one or another shape, appears in the second, seventh, sixteenth and seventeenth sections of the Regulations of 1828. In each case, it appears to me to apply to colonization, properly so called; while in the seventeenth section the distinction is plainly drawn, rendering it impossible to misunderstand the sense in which, there at least, the word is used.

If I had entertained any doubt of the correctness of the interpretation of which I have given to section 2 and section 4 of the law of 1824, and section 17 of the regulations of 1828, it would have been removed by the perusal of a document to which I now ask attention.

In 1824–'25 the attention of Mexico was specially directed to strengthening her interests on the California coast, and the subject was referred to a committee or council named by the Government to that end. This council, called the "Junta de Fomento de Californias," (committee for the advancement of the Californias,) sat about two years, and had, during that time among its members, many of the ablest and most enlightened men of Mexico; among them, Don Pablo Vincente de Sola, who had been governor of California under the Spanish dominion from 1815 to 1821, and, after the independence, was sent as a deputy to the first sovereign constituent Congress at Mexico—a man of much talent and enlightenment, as were nearly all the Spanish provincial governors. The labors of the committee have been preserved in a small pamphlet, a copy of which is in the possession of the Attorney General, from which I have been permitted to make some extracts, a translation of which is inserted in an appendix, (A.) These labors embrace several reports to the Government, and, among them, on the proper mode of adapting the colonization law of 1824 to the territory of the Californias, and proposing two plans or system of rules—one for foreign and one for domestic colonization; out of which report and plans were framed the regulations finally adopted and known as those of 1828. The views which I have endeavored to maintain of the signification of the law, are identical with those which the committee express, not argumentatively, but as a matter understood. In both Californias, say the committee in their report, "the width of the land occupied by the Mexican republic [meaning the part actually conquered from the aborigines] is very unequal, stretching from nine to ten leagues, in Upper California, ****** unless it be at one of the missions, where it may extend to fifteen leagues; under which supposition, there is no space there (*no hay alli cabada*) for foreign colonization; and, moreover, in *those interior parts* of Lower California where there might be space," it is necessary to provide against invading the rights of the Indians, &c.; and the plan proposed for foreign colonization carries out the same idea. As for the restriction contained in section 17 of the regulations, this committee are they who recommend it, except in a more absolute form, and give the reasons for it—namely, that the lands occupied by the missions were the best parts that could be found, and the same as those which, before the conquest, the Indians had occupied with their villages and fishing and hunting grounds; and though they had never experienced the benefit of division of landed property, they were *entitled* to it in their native soil, and ought to be instructed in the benefits and use of it; therefore, in these lands, "the said ancient Christian Indians, neophytes, and catechumens *ought to be considered with a right of preference in the distribution*, which ought to be arranged *between them and the settlers*, in the proportion that their circumstances respectively admit." In their proposed "plans" of colonization, the committee expressly reserve these lands from either foreign or domestic colonization, and couple the proposed reservation with that contained in section 2 of the law of 1824, and propose that the lands occupied by the missions shall be declared to be "the property" of the settlements of Indians and Mexicans already established in the country, and insusceptible of *any other distribution than among them.* And these are the recommendations (and the reasons for them) which are carried out in a modified and restricted form in the regulations of 1828. The Government is not willing, for example, to declare, absolutely, the existing population of California to be the owners of all the lands occupied by the missions; but they reserved the question, and meanwhile interdicted "colonization" upon them. (See apppendix A.)

There could not be a more melancholy example of mal-interpretation than would be the distorting of this humane provision, devised for the protection of equitable and honest rights, into a scheme for taking them away. And if the attorneys of the United States feel themselves bound to insist on a decree of confiscation going out against the old inhabitants of California, I do say that it ought to be on some more decent and becoming pretext than this.

As for the points embraced in Judge Hoffman's opinions, to which, as objection No. 3, the Attorney General calls my attention, this reference is peculiarly indefinite; so loose, and inconclusive is the "opinion." As well as I can gather, however, Judge Hoffman's "opinion" is based on two ideas, namely, the want of a positive showing that the grant of Cervantes had been approved by the territorial deputation, and of a positive showing that he had built a house on the land, and it had been inhabited within a year from the date of the grant, and a fancied application to this last idea of some late decisions of the Supreme Court.

The objection that the claimant has not shown that the grant was approved by the Territorial Deputation, I reply to as follows:

1. That if the lack of confirmation by the Deputation affects the validity or binding force of a grant, it belongs to the Government to show that the confirmation has not been given; because the supposition of law is that it has been given. The supposition of law is, that the long occupation of the land by Cervantes has been rightful; that having the grant, and living on the land as its owner, with the acquiescence of the Government, the supposition of the law is, that everything necessary to the perfection of the grant had been done, and that he held the land in fee. This presumption of law becomes stronger in a case like the present, when all that remained to be done after the issue of the grant, was in the hands of the grantor, and not necessary or likely to be known to the grantee. Nor is this presumption of the law to be rebutted by supposititious testimony; it must be met, if at all, by positive testimony, or by such negative testimony as to be conclusive. As for instance, if the proceedings of the Deputation existed complete and reasonably easy of examination, and a search of them did not show the confirmation, that perhaps might be held conclusive, or to throw the proof on the claimant.

The facts shown in this particular are as follows:

On the part of the claimant: That he received his grant in due form 1st April, 1836; shortly after went into occupation and has so continued; that in February, 1841, he received judicial posession from the proper magistrate, in presence of the only other parties interested, the adjoining proprietors.

On the part of the Government: That all preliminary steps were properly taken; that the concession, with the proceedings on which it was founded, was sent to the Deputation, and there referred to the Committee on Vacant Lands; that the committee reported, recommending the approval of the grant; that the Deputation recommitted the report for amendment.

The proof here stops; and I contend that the Government having proved so much, ought to prove more; or rather that it cannot be inferred from the proof which is in, that the approval was not given; but the contrary. *First*, because it was the duty of the Committee, after the recommitment, to make an amended report, according to their instructions, and the duty of the Deputation afterward to act on the report; and the inference of law, there being no proof or semblance of proof to the contrary, will be that those officers performed their duty. *Second*, because it was the evident intention of the Deputation to approve the grant; and that the recommitment was only intended to *perfect* the report. What was the nature of the amendment we have no means of knowing. The book of proceedings of the Deputation is not produced, as it ought to be, being the best evidence, or its absence accounted for. The book, however, does not exist, and hence we have no means of knowing what the proposed amendment was; but whatever it was, an amendment is always designed to improve, to perfect; and an intention to destroy cannot be argued from directions to amend. The books and records are not extant; the actors in the matter are either absent or dead (as shown in the testimony of Pacheco); and, as it was properly begun, there is no rule of law that will argue from mere inference, that it was not properly finished. Whatever means of proof do exist, exist in the hands of the Government; they never were in the hands of the claimant; he is not responsible for their non-production; nor for their loss; and who will undertake to say that if all the records for 1836, 1837, 1838, up to 1846, when the Departmental Assembly finally dissolved, if those records were produced, this approval would not appear? It devolves on the party denying it, and especially where that party has all the proofs that exist in his own hands, it devolves on him, to prove the omission. The record, as far as it goes, is now, and has been for years back, in the general archives; no longer in those of the committee; back among the archives of titles, and embraced in the list of "*adjudicated* lands." (See Rec., p. 76.)

2d. If, however, the grant was *not* approved by the Deputation, it could only have been from *neglect* on the part of the officers of the Government. The grant was in every respect proper; there was no reason known to the law, or to the policy or custom of the country, why it should not have been confirmed; every reason of law and policy combined, why it should have been ; and if it was not approved, the cause was in that civil revolution which at the moment the grant was before the Deputation, broke up the proceedings of that body, and in the subsequent neglect of the successors of that body to take up its unfinished business. From this neglect or forgetfulness on the part of the agents of the grantor, the claimant cannot lawfully and ought not to suffer.

Let us, however, examine what is in fact the nature of this approbatory function of the Territorial Deputation.

By section 1, of the Mexican Executive Regulations of 1828, the Political Chiefs of the Territories were authorized to *grant lands*—"*conceder terrenos*"—to *empresarios* (that is, contractors to bring in colonists) and to private persons. Section 2, 3, and 4 point out the.preliminary steps, and the mode of making concessions. Section 5, declares that concessions made to individuals shall not be held "*definitively binding*," or, as it may be translated, *definitively valid*, without the consent thereto had of the Deputation. Section 6 declares that when the Political Chief shall "*fail to obtain*" the approbation of the Deputation, he shall report the case to the Supreme Government, for its determination ; that is, he shall appeal, on behalf of the grantee, from the Deputation to the supreme authorities.

The necessary corrollary is, that it was the business of the Governor to *make the grant ;* that the Deputation had the power to affirm it, and thereby render it definitive ; or they had the power to *refuse* their affirmation, and thereby throw the final determination of the grant on the Supreme Government.

Two further deductions also follow : 1st That the Deputation *could not destroy a grant;* 2d. That after the making of the grant, by the Govenor, no other power, not even the Supreme Government, could interfere with it, to question its validity, *pending the action of the Deputation.*

Whilst then, the Territorial Deputation of California existed, it had power over grants of the nature of the one now before the Board, to this extent, to wit : definitively to *affirm* them, or qualified to *negative* them : pending this action, and until a direct refusal of affirmation, the grant continued subsisting and valid, without power, on the part of any other functionary or authority, to question or interfere with it. Consequently, on the dissolution of the Deputation, without exercising that qualified negative, the grant necessarily became absolute, because there was no longer any person or body to whom the power had been reserved to question it.

It is certain that the concession spoken of in the law, had vitality—had validity—immediately on being made by the Governor. This follows from the positive terms in which the granting power is given to the Governor, and to him alone ; from the usage and custom of the country, as is shown in the proof, and which is likewise contemporaneous exposition of the law; from the objects and policy of the law; and from the qualifying word *definitively* applied to the validity which the approval of the Deputation should confer. It must have had some kind of validity before, since it was now to be made *definitively* valid or binding.

The Attorney of the Government attempted, with great ingenuity, to erase this word *definitively;* but it is full of meaning and is inserted for a purpose, and to strike it out would change the character of the law, and, as we shall see, reverse its purpose.

Now how was this original vitality and validity to be destroyed? It could only be destroyed *by the concurrent action of the Deputation, begun by the Deputation, and of the Supreme Government affirming that of the Deputation;* because, from any negative action of the Deputation, the Supreme Government reserved an appeal to itself; but did not reserve any original right of negation. It follows, then, as stated above, that when the only tribunal that had power to originate a negative action has ceased to exist, that negative action has become impossible, and the grant per force absolute.

Again, the grant is made by the appointed agent of the Government. It was made according to law; but it is not definitively binding till it has gone through another prescribed process. It is not definitively binding, because it may still be reviewed, annulled. But it can only be reviewed in a particular way, by a particular tribunal; and can only be annulled by the Government itself, after being *thus* reviewed. Now when that particular mode of reviewing the title by that particular tribunal, becomes impossible, the control of the Government over the title is gone, because it did not reserve any other mode or means. The decisions which may be made, by this Board, in favor of claims, will be *valid* certainly; but not definitively binding on the Government of the United States. The cases will still be in the control of the government for review and possibly reversal; but in its control only through a particular mode and means. Should that control, in the particular prescribed way, in the exercise of a just discretion on the part of the agents of the government, be not availed of, or even in any way become impossible, then the control of the government is gone—gone absolutely—gone definitively—gone forever—and the decision of the Board becomes absolute.

The Mexican government did not then reserve any power to negative grants to individuals, made by its territorial Governors, except when the same should be first disapproved by the territorial deputation, Its policy was, to have the lands distributed; distributed by secure titles, and with as little expense and trouble as possible to the grantee; hence, it was not its policy to hold titles in suspense, or reserve questions concerning them for settlement at that remote capital, except where the local council, by disapproving a grant, should raise a just doubt of its propriety.

Hence, that government did not reserve any other power over grants once made by its Governors; nor any other means of reaching them; and hence, I say, that that means being abrogated, or become impossible to be exercised, the grant stands divested of the reservation to its definitive validity.

It is easy to perceive the object of these provisions. It was the intention of the Mexican Government, that the settlement of the territories should be made conformably to the views of the central authorities. Hence the law gives the central executive control over the peopling of the territories; and the regulations depute the exclusive granting power to an officer who held his appointment from Mexico, came hence impressed with the wishes of the central government, and was responsible to it for his conduct. At the same time a sufficient check was placed on the Governor's otherwise absolute discretion to secure the rights of the native population of the territory, and to give the government notice of abuses. The qualified negative reserved to the deputation accomplished that object; but any power in the deputation beyond that qualified negative, would have defeated the purpose of the government. Because an absolute negative given to the deputation, or, what is the same thing, if their positive concurrence had been made necessary to the vitality of the Governor's concession, then the whole power would be virtually taken out of the hands of the Governor—the federal appointee—and he compelled to fall into the views, however narrow and exclusive, of the local council; or the granting power come to a dead lock. Neither of these alternatives was consistent with the plan of the Central Government. It was not consistent with its paternal policy that the people of California should be deprived of a just participation in the distribution of the domain of their territory, by a Governor coming from abroad, and having perhaps no sympathy with them; nor, on the other hand, was a controlling power in the hands of the local functionaries, consistent with the enlarged views which that government ever entertained, but had never energy or consistency to carry out, of peopling this country with whatever enterprising population it could invite to it, and opening that commerce with Oceanica and Asia, which is just now, under other auspices, spreading its pinions.

Under this view of the policy and intent of the law, it is thoroughly consistent, and its provisions well framed and adapted. But let us look at the consequences of the construction now attempted to be given to the functions of the deputation. If this construction be correct, that body had by implication, and might always have exercised, what was denied to it both by the policy and letter of the law. If the concession made by the Governor had no inherent validity—no vitality till the breath of life was given it by a positive vote of the deputation—then the deputation, by mere inaction—by mere letting alone—was able to tie up the hands of the Governor, hold the lands vacant, cut off the Supreme Government from its reserved right of final decision, defeat the grant, defeat the views of the government, and defeat the policy of the law. This would be a "masterly inactivity" with a vengence. Powers may and will be sometimes implied to carry the purposes of a law into effect, but not to defeat its benevolent intentions, or enable inferior functionaries to circumvent the reserved powers of the superior.

But the 5th and 6th sections of the Regulations, besides a qualified restriction on his acts, impose also a *duty* on the Governor, viz: to *obtain* for the grant the approval of the deputation; or, failing that, to report the case to the Supreme Government for its final action. Now, I submit, that, in the absence of any proof to the contrary, it must be presumed that the Governor performed this duty, and did either obtain the approval of the deputation, or that of the Supreme Government. And while I think that this is a presumption which the law will per force give us the benefit of, I think the long quiet possession under claim of title, with knowledge and acquiescence of the government and the public, and all the authorities, establishes, in point of fact, and amounts to a declaration on the part of the government that the grant had been completed.

Finally, we have shown that the usage and custom of the country was that grants should be valid and subsistent from the time of the Governor's concession, as is indeed expressly enacted in section 22, of the Colonization Laws of 1823, and which has never been repealed, except so far as it is inconsistent with subsequent laws. The repeal of old laws is not effected by the enactment of *different* provisions—the new provisions must be *contrary*. 7 Mar. La. Rep., N. S. 434.

The usages and custom, however, is sufficient for us, for this usage and custom is made positive law by the act of Congress creating this Commission. Mitchell's case, 9 P. 734; Strother v. Lucas, 12 P. 436. Smith *v.* U. S. 10 P. 329.

In Arredondo 6 P. 714, 715, the Supreme Court takes notice of, and acts on the usage and custom of the province, though this is not prescribed as a rule of decision for them, in the act of Congress conferring the jurisdiction. Because, usage and custom, say the Court, are a *part of the law.* That the proceeding would be a *mockery of justice* if Congress had intended to exclude from their consideration "usage and custom, which are the law of every government."

Testimony of Hartnell, Rec. p. 67; Colonization Law of 1823, § 22, 1 White's Recop. p 588; 7 Mart. La. R., N. S. 434; Mitchel's Ca., 9 Pet. 734; 12 Pet. 436; 10 ib. 329; Arredondo's Ca., 6 Pet. 329.

To the objection that the claimant has not shown that he built a house on the land within a year after the date of his grant, I reply,

1. That the law does not make any requisition of that kind, and hence that the condition inserted in the grant is not obligatory. Section 11, of the Regulations of 1828, provides that a certain time shall be fixed by the Governor within which improvements shall be made; but this provision relates only to concessions made to *empresarios*, for colonization.

2. That by the provision inserted in the grant, non-performance which time the grant was good, and even then the grantee would does not void the grant, only opens the land to denouncement, until have had preference over any other who might desire it, and an extension of time on proper showing, be given him to occupy it. The first section of the Regulations of 1828, authorizes the Governor to grant lands to persons who may solicit them "with the object of cultivating or inhabiting them;" but no time is prescribed within which this intention must be carried into effect. If carried into effect, therefore, within a reasonable time—within a time to show that the application was sincere—both the purpose and the letter of the law will be answered. In the present case the occupation did follow within a reasonable time, and in time to show that the grant was solicited for the purpose contemplated in the law. Moreover, the disturbed state of the country, and particularly of the neighborhood where the land was situated, was a sufficient reason for not opening a new and exposed settlement, during the years 1836 and 1837. Before the revolution was completed, or order restored, the grantee had made his settlement, built his house, and established his family, as is shown in the testimony. This is as much diligence as any law can require.

3. Even if the grant had been void, for non-improvement of the land within a year, the subsequent improvement, before advantage was taken of the lapse or the land denounced, would cure the fault and consolidate the title. That is, if after the expiration of the specified year, and before the improvement, the land might be denounced, and granted to another; yet, if not denounced, during that interval, it could not be after the improvement or occupation. The condition in the grant does not contemplate the forfeiture of the land to the government; only proposes to make it voidable, in favor of another, more enterprising than the grantee, should any other seek it in the prescribed mode. The title does not, and does not profess, to reserve any power in the government to recall the grant to itself. As this tract was never denounced, the necessary inference is, that, according to law and the usages and customs of the country, it was never opened to denouncement. At all events, if ever denounceable, it ceased to be so after the improvement was made or occupation commenced. [Owing to an intimation from the court, prior to the passing of these sheets through the press, that the case would

probably be decided on a question of jurisdiction, and the merits consequently not be considered, I have not thought it necessary to enlarge on this point, or insert the collation of authorities which elucidate it. A proceeding before the Mexican authorities in California, pertinent hereto, is inserted in Appendix B.]

4. Moreover, the real concession, the document by which title passes—the decree, in which the Governor parts with his discretion, and "accedes," in the language of the law, "to the request of the petitioner"—does not contain the condition. The grant there is unconditional, in fee simple. How could the Governor afterward limit this title, by the insertion, in what is called the "title in form," and which is merely ministerial, of a material limitation like this?

I believe we may admit (without any violent depreciation of ourselves,) that the successive Governors of California, who made grants, and successive executives of the Central Government, who knew and acquiesced in the manner of those grants, knew as much of the intent and policy of their laws, and of what was proper under them, as we, strangers to their language, unfamiliar with their legal ideas, and with the facts, circumstances, and previous laws, on which their statutes are founded, can possibly know.—That what constitutes a transfer of property from one to another, whether from individual to individual, or from a government to its citizen, is the will to do so; that in these grants, the will of the Mexican nation, the policy of its laws, justice to its citizens, expediency, the purpose she mainly wished to promote, namely, settlement of the country, all combined to vest in the grantees, the ownership—the property—of the land. That when Mexico owed these lands to her citizens for their services; when she desired her citizens to have them, and own them, as a measure of public policy; when she held them for no other purpose than for distribution to her citizens, and invited them to come and reduce them to ownership; when she wished and intended to bestow them on her citizens, and with that intent gave grants to them, that she succeeded in her intent; that her citizens did thus acquire rights and property, which she took care to stipulate should be respected and protected.

This is the honorable and true aspect in which to regard these cases. The claimant here has rights—rights of property. I care not whether his grant ever or not received the approval of the assembly, and that were necessary, or the consent of the Supreme Government, and that were necessary, he was within the policy, intent and direct words of the law, and was entitled to the grant, which he got, and was entitled to whatever approval or consent was necessary to its completion; entitled to it by law and according to the principles of equity, and the usages and customs of the country, and would now be entitled to it, and could claim and receive it, were the other government in existence. But he comes here in a superior condition ; he comes here with all terms, qualifications and restrictions of his grant cut off and released, and his rights made definitely binding and absolute. Admitting that the former government, in the exercise of an arbitrary discretion, might have refused this approbation of his grant to which the claimant was entitled; the present government reserved no such power; it reserved no discretion in the case ; no power over property, whether founded on incipient titles or complete ones; no power of approval or disapproval, refusal or consent; it reserved no power, whatever, over the case; only undertook a solemn duty and obligation ; a trust.

I am aware that it is said, that the powers and obligations of the government are neither restricted nor increased by the stipulations of the treaty in regard to private property ; that the laws of nations would equally have protected it; that it has also been held that our government retained, under treaty stipulations almost in the same words as those in the treaty of peace and limits with Mexico, the same powers over imperfect titles that the former government had or could have exercised.

With all deference, I must say, that should the points directly arise and be discussed, it appears to me that neither of these positions will be found strictly correct.

On the point first specified, the true doctrine seems to me to be this: that the laws of nations protects private property in conquered or ceded countries; but leaves the rights therein in the same state as the conquest or cession finds them; so that if one happen to be found with an imperfect title, or, to use the words of the Mexican law, with something wanting to its "definitive validity," then the law of nations gives him no remedy, whatever appeal he might have to the justice and magnanimity of his new sovereign; or at least in this case, the trust created is only an implied trust. But the treaty does more than this; the treaty undertakes that he shall be *maintained and protected* in his property; not left in a state of uncertainty, much less his undetermined title be determined against him; and this is an express trust.

On the second point, the true doctrine I believe to be this: that without any treaty stipulation, a province changing sovereigns, comes to the new with all the powers over it that were possessed by the old; hence, whatever discretion remained in the hands of the old government, over incipient grants, would come to and might be exercised by the new. But by the treaty stipulation, this power is foregone; because, it being a well settled principle, that inchoate, even incipient titles are property, and the treaty undertaking to protect and maintain property, it releases necessarily all rights of forfeiture or voidance, and places all kinds of honest titles on an equal footing—of course making all perfect, since it equalizes by elevating, not reducing. This seems to me to be fully recognized in the case of Chouteau's heirs, 9 P. 137.

I take the ground distinctly, then, that our title here stands recognized, confirmed, completed, and forever valid and binding, *ipso facto* by the treaty.

That we had *property* according to the laws of Mexico.

Property according to local usage and custom.

Property according to the contemporaneous and uniform and concurrent interpretation and construction of the law, running through nearly twenty years, and continually acquiesced in by the federal government.

Property recognized by six successive governments of California; by the public voice; by all inferior authorities; by many declarations and admissions of the government.

Property for which we paid a valuable consideration; the consideration of settlement and occupation; all the consideration which the government that gave it, wished or required.

Property fully separated from the public domain, and to reattach which no lawful power exists.

Property in which we are entitled to be maintained and protected, by all the power of the federal government.

Property in which all the presumptions of law argue that there is no imperfection; but in which, if there be defects or imperfections, we have a right to have them cured and a treaty guaranty that they shall be cured.

Property inviolate by the laws of the social compact, and by the positive enactments of the constitution and the treaty.

In the case of Chouteau's heirs, 9 P. 137, (a Missouri case) the claim was founded on an order of survey and possession, made by the Lieutenant Governor, and concluding as follows: "and afterwards the applicant will have to solicit the formal *title of concession*, of the Intendant General of these provinces, to whom belongs by order of his Majesty, *the disposing and conceding* of every kind of vacant lands of the royal domain." The claim was surveyed about fourteen months after the date of the order, and accompanied with about three years possession.

The Court held, that this order of the Lieutenant Governor, was a foundation of title, and according to the acts of Congress, and the *general understanding and usage* of Louisiana and Missouri, capable of being perfected into a complete title."

"It is *property*, (say the Court,) capable of being alienated, of being subjected to debts, and is as such to be held sacred and inviolate *as other property*."

The claim was declared valid. Another case of the same parties, 9 P. 147, founded on a like order of survey, made 8 January, 1798, by the Lieutenant Governor, and concluded in like manner, except referring the claimant for his title to the Governor General.

This warrant was plainly in violation of the 9th article of the

Regulations of O'Reilly, exceeding largely in quantity the maximum of those Regulations. The Court held that that article was only applicable to a grazing country, and, consequently, that if the regulations had been extended to Upper Louisiana, *it was* PROBABLE *they were extended with modifications, at least of the 9th article*."

Thus where the Court has been obliged to resort to probabilities, they *invented probabilities* to sustain a good faith claim, and maintain the national obligation. They *invented* probabilities in behalf of justice and honor; for this was not a probability of fact, though it was of law.

In this case the order of survey was not acted on by the claimant till December, 1803, more than five years after its date; but the Court did not allow the objection to prevail. In this case, the Court lays much stress upon the Governor's own representation of his powers, and also upon the fact that, neither the Governor nor Intendant General had ever *refused to perfect* an incomplete title granted by a governor or sub-delegate; and we ask here like credit to be given to the Governor's declarations of his powers, and to the fact, that, as far as we know, no grant of a California Governor has ever been annulled.

Nearly all the Missouri claims were founded on the same kind of inceptive title, as those already named, provisional on their face, and directing the grantee to apply either to the governor general, (who was first invested with the granting power) or to the intendant general, (who succeeded him) at New Orleans, for his title, for the reason that it belonged alone to those officers to concede lands.

These instruments of the Missouri claimants were not grants, and did not profess to be; they were permits at will, and imposed a duty on the party receiving them to apply to the granting officer, before he could receive a concession. Now, even supposing the view urged for the United States in relation to titles here and the character of the approbatory function of the Deputation, to be correct, yet the difference is infinitely in favor of the unconfirmed grants here.

1. The Governor here was the *granting officer*, and made his patent in due form of grant, *dedi et concessi*, which the Lieutenant Governor at St. Louis, was not, and did not.

2. The supposed necessary conformation here was the *governor's* to obtain; there all the subsequent steps were the *donee's* and his *laches* if they were not performed.

3. In the Missouri cases, if the governor general or intendant general should have refused the confirmation, the grant would fall; whereas, in California the authority whose province it was to *complete* the grant, *could not defeat it.*

4. The California patents are *grants*, wherein the granting officer parts with all his discretion in the matter; the Missouri per-

mits were *not* grants; they were only informants or reports to the granting officer in favor of grants.

In regard to what courts will *presume* in support of undisputed occupations, and the powers of officers who assume to grant: In the case of Pickering *vs.* Lord Stanford, in Vesey, jr., 583, the High Court of Chancery held that "every presumption that can fairly be made shall be made against a stale demand." "At law, in suits where the title can be made good only by matter of record, as letters patent, or even where a private act of Parliament was necessary, the presumption holds, though neither of those instruments, which ought to be of record, can be found."

Now the records of the Privy Seal, where the records of the King's patents ought to be found, and the rolls of Parliament, where the private acts of Parliament ought to be found, cannot be less complete, or less easy of search, than the old archives of the Territorial Deputation and Departmental Assembly of California; kept in the first instance in loose sheets, or unbound blotters; exposed in twelve years to half a dozen civil revolutions; shipped from Monterey to Los Angeles, from Los Angeles to Monterey; thence to Sonora; thence to Benicia; and finally to San Francisco; and during nearly all the intervals of these migrations, open to whoever chose, and liable to depredation, destruction and loss. To presume a patent from British Crown, or an act of Parliament, where no record of them can be found, is a violent presumption; a presumption of law, to maintain the equity of ancient appropriation; not a presumption of fact, nor hardly warranted in fact. To presume a private act of the Deputation or Assembly of California, or of one of its Governor's, is not a violent but a natural presumption, and especially in a case like this, where we know the proceeding was begun, and required but a single step to complete it; and where the books in which it ought to be recorded, are not to be found.

In the case of Bealey *vs.* Shaw, 6 East. 215, Lord Ellenborough, says, twenty years exclusive enjoyment (of water) affords a *conclusive presumption* of a right derived from grant or act of Parliament; and "less than twenty years may or may not according to circumstances." And the Supreme Court have held (Ricard *vs.* Williams, 7 Wh. 59, end in other cases) that presumptions of this class apply to corporeal as well as to incorporeal hereditaments.

True, we do not come in this case, with the twenty years occupation which, according to Lord Ellenborough, would afford a "conclusive presumption;" but that rule is only where the case stands on presumption alone, and even then a shorter time will have the same effect, if other circumstances (as in this case all circumstances do) conduce. The rule holds in all cases where the occupation may have had a legal beginning; how much more where we have shown that it had, in fact, a legal beginning, and was in all particulars conformable to the laws and policy of the country.

In the case of the United States *vs.* Clarke, 8 P. 462, the Supreme Court *presume* the rightfulness and binding force of grants of the kind under their consideration, from the power of making them having been exercised *since the year* 1813; and that the King (supposed to be informed of the acts of his officers) had not disapproved of it. The presumption there rested therefore on a practice of five or six years, since it dates only from 1813, and the treaty was formed in February, 1819. Here, we claim a practice reaching back to the year 1773, since which time the Governors of California have made such grants, with the knowledge and assent of those above them, and respected by those beneath: from 1773 to 1846—forty years under the Spanish Government, twenty-three years under the Mexican. Leaving out, however, all the time prior to the introduction of the law of 1824, as carried into effect by the Regulations of 1828, we have still a period of eighteen years; or dating from the year 1833, when the administration of Governor Figueroa commenced, we have a period of thirteen years of uninterrupted exercise of this power, by seven successive Governors of California, with the full knowledge of the Supreme Government, and without a syllable of disapprobation.

In the case last quoted, (Clarke's case, 8 Peters,) the grant recited a particular royal order as the authority on which it was made, and which order it was admitted *did not authorize* the grant. The Court held that the recital of the order was an immaterial allegation, and did not affect the instrument; that it "would be *presumed* that the Governor had acted within the limits of his authority, though that authority was not shown." The same doctrine is held, in a multitude of other cases; and in Strother *vs.* Lucas. 12 P. 438, is declared to be "too deeply founded in law and reason ever to be successfully assailed."

But, apart from all these presumptions of law, the principles of which, applied to the circumstances of this case, appear to me to be conclusive, I hold that the claim before the Board has been absolutely and unconditionally ratified and confirmed by the Mexican government, in a decree of its authorized agent, Governor Micheltorena. This decree, which was a public act, was issued on the 29th March, 1843. It exists in the archives in Mss., and is published, with the exception of the preamble, in the Senate editions of the several reports that have been made to the Government on Land Titles in this State. The preamble to this decree, (from which extracts, together with the instructions on which it is founded, are given in the Appendix,) asserts that it is made in pursuance of ample faculties given by the Supreme Government. It relates especially to the lands which had been granted subsequent to the secularization laws of Mexico, out of the tracts previously occupied by the Missions, and declares in regard to such grants that "policy renders irrevocable what has been already done;" and concludes with an assurance of protection to the Missions, and to private property, "securing to the owners the possession and preservation of the property they now hold," but stipulating not to make any new grants (of Mission lands) "without consultation with the priests," etc.

Micheltorena came into California on a mission of peace. After the revolution of 1836, and the subsequent erection of California into a "free and independent State," though this independent position was not long maintained, little more than a nominal reconciliation took place; and the war with Texas, the civil commotions, and frequent successions of revolutionary governments in Mexico, prevented the Central Government from giving proper attention to this remote Territory. When the prevailing contests in Mexico were cut short by the plan of Tacubaya, and the election of Santa Anna as Dictator, an era of political regeneration was announced, and Santa Anna, in pursuance of the extraordinary faculties given by the 7th article of said Plan,* hastened to consolidate his powers by the despatch into the different departments,† of trusty agents attached to his cause, with the amplest faculties to redress grievances and remove subjects of complaints. In pursuance of this policy, Governor Micheltorena was sent to the department of the Californias, to represent the powers of the Federal Executive, who represented and wielded the powers of the nation. He was sent to fulfil the neglected duties of the Supreme Government; to restore quiet; to conciliate the inhabitants; to develope the resources of the country; to hasten its settlement, and improve its commerce. All these are prescribed in the general instructions given him, with ample powers to carry them out. These instructions not having been heretofore printed, as far as I am aware, I have inserted them, together with a translation, (both copies official,) in an appendix hereto. It will be perceived that they are written in the most conciliatory spirit, and an earnest desire shown in them to have every cause of anxiety or complaint existing in California toward the Supreme Government, removed or rectified, and all public interests and desires attended to. It was pursuant to these instructions, and under the complete power which they conferred, that the decree of

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*The Bases of Government established at Tacubaya, 28th September, 1841, by a reunion of the military under Santa Anna, and ratified 6th October, 1841, by a convention between the contending parties under Bustamente and Santa Anna respectively, and contained in the first volume of the *Observador Judicial,* page 7. The 7th article is as follows:

"Las facultades del ejecutivo provisional son todas las necesarias para la organizacion de todos los ramos de la administracion publica." (The powers of the provisional executive are all those necessary for the organization of all branches of the public administration.

†The Mexican federation was broken up in the year 1835, and the States reduced and territories erected, into "Departments." The federative system (with the constitution of 1824,) was restored in 1846–7.

Micheltorena (as we are informed in its preamble) was made. The decree, though intended mainly for those cases where lands formerly pertinent to the Missions had been granted subsequent to the secularization laws, is yet general in its character, and may well be construed to a general intent. But, in the present case, we come directly within its provisions. The grant of Cruz Cervantes was one of those covered by its immediate intent. It had been pertinent to a Mission; under the secularization laws it had been granted; and whatever assent or approval it needed to its completion, it now received from the highest granting power, and was thus made "irrevocable."

Our attention cannot fail to be struck by the fact, that neither in the instructions to Micheltorena, enumerating the grievances he is to correct, and the means of conciliation he is to employ, though it is evident they intended to cover every disquieting cause in the department, nor in the decree of Micheltorena, intended for the resolution of disturbing questions, and the quieting of private rights, is a word said of the question of the "ten leagues."

Does not this fact put the matter at rest, as far as any acts of those high functionaries can give an authoritative intepretation to the law? Do not these instruments, at all events, convey the federal approbation and consent, as fully as any interpretation of the law can require, to rights of property up to that time acquired?

I ask attention to this decree of Micheltorena; and I claim it to be an absolute confirmation, with the approval of the Federal Executive, of this claim.

I take the ground, also, that our title, even if imperfect, and even if subject to be vacated and resumed by the former government, stands confirmed and absolute *ipso facto* by the treaty.

In the case of Simms *vs.* Irvine, 3 Dallas 425, Douglass acquired a right under the British government to five thousand acres of land for services in the French war. He assigned to Simms, who afterwards obtained a warrant from the State of Virginia, and located it on Montour's island, in the Ohio river. In determining the boundaries between the States of Virginia and Pennsylvania, this island went to Pennsylvania. Under Pennsylvania, Simms obtained a survey according to his warrant, but did not obtain a patent. Irvine claimed under a statute of Pennsylvania, authorizing him to make a pre-emption on the island, and proceedings under it. The court held (opinion by Chief Justice Ellsworth) that Simms, by his warrant from Virginia, and location of it it on the island, acquired a complete equitable title, and needed only a patent for a complete legal title; that a *confirmation* of this equitable title, AS COMPLETE AS A PATENT COULD HAVE BEEN, was conferred in the compact between Virginia and Pennsylvania, "reserving and confirming" rights previously acquired under Virginia; that the terms of the compact must be expounded favorably for those rights, so that titles before substantially good, should not, after a change of jurisdiction, be defeated or questioned for formal defects.

The terms of the compact between Virginia and Pennsylvania were not nearly so conclusive as the guaranty of the ninth article of our treaty with Mexico. "Reserving and confirming" rights might very well be construed to mean reserving and confirming them in the State in which they were found; but the stipulation to "*maintain and protect property*" is much more comprehensive, and imposes much larger obligations.

In the case of Fairfax *vs.* Hunter, 7 Cranch 703, Denny Fairfax, an alien enemy, was devisee of Lord Fairfax of the property called the Northern Neck of Virginia; and in the year 1789 the State of Virginia patented a portion of the lands to Thomas Hunter. The suit was brought to eject Hunter.

The court held, that though Denny Fairfax could not have taken the land by descent, i. e. by operation of law, he took it properly by devise, i. e. by act of the party; but that he took it not for his own benefit, but for the benefit of the State; that from the time of the death of Lord Fairfax in 1781, down to the treaty of 1794, the State had, consequently, a right of entry into the lands, and by proper proceeding by inquest of office, to consummate their title. But that having omitted this proceeding, whether by mistake or design, prior to the treaty of 1794, the right of the State was cut off by the treaty; that the possession and seisin of the plaintiff continued up to and after the treaty of 1794, "*which* (i. e. the treaty) being the supreme law *confirmed this title to him*."

The clause of the treaty of 1794, (article 9) quoted in this case, is, that "it is agreed that British subjects who now hold lands in the Territories of the United States, and American citizens who now hold lands in the dominions of his majesty, shall continue to hold them *according to the nature and tenure of their respective estates*;" language that might without violence have been interpreted that Denny Fairfax having before the treaty, held this estate in trust for the Commonwealth, and liable to entry by an inquest of office, continued so to hold it. But the Court took cognizance of the treaty, according to its intent, and held that *it* confirmed the title of Fairfax, and cut off the right of forfeiture in the State.

So we contend, under the far more comprehensive and obligatory terms of the treaty with Mexico, that by the treaty our title here is confirmed, and whatever right of forfeiture or avoidance may have been in the State before the treaty, has (in the language of the Court) "*by the operation of the treaty*, become ineffectual and void."

In the case Marlett *vs.* Silk, 12 P. 20, again, plaintiff claimed under a right derived from the State of Virginia; defendant under a title from the State of Pennsylvania. Plaintiff entered on the land (in Western Virginia) in 1772, contrary to law, and consequently as a trespasser; but in 1779, the Legislature of Virginia recognised settlement rights in the plaintiff and others in like circumstances, and authorized them to enter a certain number of acres each. The defendant claimed under a warrant from Pennsylvania, taken out in 1773, and surveyed in 1778. Afterward by the settlement of limits between the two States, the land came under the jurisdiction of Pennsylvania, and, by the compact, rights acquired under the States respectively, were to be respected by the other according to priority. The Court held, that the case was, so to speak, an international one, between two States, and the *rule of decision to be the compact;* that Virginia by the act of 1779, had recognised the right of plaintiff as beginning in 1772, when he made his settlement; that that right, however inchoate and shallow, was protected by the compact; and the case was so decided.

The 11th section of the act of 1851, prescribes as rules of decision, the treaty, the laws of nations, the laws, usages and customs of the country, the principles of equity, and the decisions of the Supreme Court.

The treaty is first and supreme; and the others, as it seems to me, can only be considered as prescribed in subordination to that higher law, and to be invoked only where they come in aid of it. The inferior cannot override the superior; no law or rule of decision can override the treaty; and we appeal to the treaty, which guarantees the protection of our property, as the "*rule of decision;*" by the "operation of which" all rights of forfeiture (if any before existed) are "rendered ineffectual and void;" and our title "confirmed, as effectually as any patent could do it."

APPENDIX.

A.

Extracts from the Mexican pamphlet entitled "Coleccion de los Trabajos Principales en que se ha ocupado la Junta nombrada para meditar y proponer al Supremo Gobierno los medios necesarios para promover el progreso de la cultura y civilizacion de los territorios de la Alta y la Baja California: anno de 1827." *(Collection of the Principal Labors in which has been occupied the Junta appointed to consider and propose to the Supreme Government the measures necessary to promote the progress of cultivation and civilization in the territories of Upper and Lower California.)*

Dictamen de la Junta, &c., sobre las Instrucciones del gefe superior politico de estos territorios. (Report of the Junta on the Instructions to the superior political chief of those territories.)

Extracts.

"All the chapters [of the Instructions] which direct themselves to prevent the interference of the missionaries in temporal affairs of the missions, the bad treatment they give to the neophytes, the influence which this has to prevent the gentiles from being reduced, and the opposition of the said monks to the formation of haciendas, rural estates, and the distribution of lands, need, in the opinion of the junta, the greatest explicitness." . . . .

The chapters of the instructions relating to the distribution of lands has given occasion to the junta for various reflections which ought not to be passed over in silence. The 14th title of said Spanish regulation [Regulation of 1781, for the government of the Californias, published in Arrillaga for 1828, and in Jones's Report, pp. 25, 50] explains clearly the design of promoting the population, not only by means of a proportionate distribution of lands, but by the conditions of it, and the other aids which the same regulations granted to make them profitable. All that has been executed in pursuance of this ought to appear in the book of population that the 17th article provides for. Our law of colonization is, in itself, directed to the invitation of foreigners, although it declares explicitly the preferences all Mexican citizens should have. It has for its object the lands of the nation, which, not being private property, nor appertaining to any corporation or town, may be colonized. Besides, it declares that lands cannot be colonized which are comprehended between the twenty boundary leagues with any foreign nation, nor ten litoral leagues, without the previous approbation of the supreme general executive power. They provide, also, with great prudence, that the State Congresses should make, with the greatest brevity, the rules of colonization of their respective limits, conforming in all to the constitutive act, general constitution, and rules established in the law itself; though in this respect it charges that, without prejudging the objects of the law, the government shall take such measures of precaution as they judge necessary for the security of the federation, with respect to the foreigners who shall come to colonize.

Although, then, the same law directs that the government, conformably to the principles established in it, shall proceed to the colonization of the Territories of the Republic, it appears that to put it in execution in whatever of the Territories, there ought to precede, and it is absolutely necessary there should precede, some regulation formed with a knowledge of the particular circumstances of each Territory, which shall determine the conditions and obligations on which the lands shall be distributed, so that by these means the desired end of settlement and cultivation may be obtained, and so that the introduction of the colonies shall not be burdensome to the natives. In California there are very especial circumstances which make this regulation more necessary, namely, on account of the existence of a prior one, [i. e. the Reglamento of 1781, above mentioned,] whose effects will be perpetuated if some provision do not alter them, and make uniform the new distribution; also, that in both Californias, the width of the land occupied by the Mexican Republic is very unequal, stretching from nine to ten leagues in Upper California, which is the land held as most fertile, beautiful, and picturesque, unless it be at one of the upper missions, where it may extend to fifteen leagues; under which supposition, there is no room there for foreign colonization; and moreover in those interior parts of Lower California, in which there might be room, it is necessary to provide against the spirit of invasion upon the lands occupied by the native tribes, since the inquietude caused by dislodging them from their lands would bring no advantage either to the said Indians or to the Republic, as social communication and friendship ought to be directly desired; and because it ought not to be forgotten, that occupation having been made of all the land, since the existing missions have, in forming themselves, taken possession before the conversion and reduction of the gentiles, according to the rigorous law of discoveries, and planted at the same time the cross and the standard; that regularly they have chosen for the missions the *rancherias* themselves of the gentiles, or those places which they, as acquainted with and owners of the land, had destined for the greater convenience and vicinity to the rivers or springs for their gatherings and campings; that although the California gentiles have not known the right of the division of landed property, it cannot, therefore, be denied that they have it in the soil where they were born, according to the principles of the law of nations, it being the first and inexcusable step toward their civilization, to cause them to know and recommend to them how appreciable is that right; and in this view, the said ancient Christian Indians, neophytes and catechumens, ought to be considered with a right of preference in the distribution, which ought to be arranged between them and the settlers, in the proportion which their circumstances respectively admit, since, for the catechumens, and strictly neophytes, it may be necessary that they shall be directed in the cultivation, or that they remain in community; and lastly, because the distribution of estates being so interesting a work, and any mistake, once made, is not easily repaired, care ought to be taken in each instance in giving to those who have the disposition and necessary means for cultivating it; for there never will be a society of cultivators, supposing each man who wishes land has nothing to do but to come and ask it, and scratch it over, in order that it shall at once produce immediately and daily what is necessary for the subsistence of themselves and family.

The junta think, therefore, that the instructions which are given to the new chief on this point ought to be reduced to this: that he inform himself of what has been done in pursuance of the said provisions in the Spanish regulations; in what state he finds the distribution of lands; which are those occupied by the missions; if there be any vacant lands, and their quality and extent; what number of persons of the settlers or Indians have the capacity of cultivating for themselves; and in case there are some of them who undoubtedly have it, that they provide that of the common lands of the respective missions to which they are attached, and taking care that there remain enough for the maintenance of the neophytes and catechumens; they shall assign to them that which appears proportionate for their cultivation; with the reservation of rendering an account to the supreme government for its approbation; and saving the provisions of the regulations which shall be formed to prescribe the conditions and obligations to which the divisions of lands shall be subject.

The chapters of the instructions which treat of the care and vigilance which the chief of the Californias ought to take to hinder foreign introductions, are of the greatest importance. The last [Spanish] governor of Upper California, who is *vocal* (speaker) of this junta, relates that he sent to the Spanish viceroyalty an account of the reclamations he made upon the Russian establishment in the port of Bodega; and these reports may be found in the archives of the secretary of the said viceroyalty, or among the papers which have been drawn from them. Moreover, in the opinion of the junta, the chapters with which the new chief is charged need some explicitness in the respect that he inform himself whether the Anglo-Americans have descended the river Columbia, if they observe religiously the treaty of limits of the 22d of February, of 1819, and that he impress on the inhabitants of the Californias and the colonists that the dividing line shall not pass the 42°.

MEXICO, 3 *January*, 1825.

"PLAN OF FOREIGN COLONIZATION.—[*Extracts.*]

"*Regulation to which colonization should be subjected, in fulfilment of the law of the* 18*th August, of* 1824.

"ART. 1. In the lands of Upper California, shall be distinguished, for the purposes of this regulation, the part reduced and actually occupied by the republic, and that which is possessed, occupied, or inhabited by the gentile natives.

"2. The lands actually occupied by the missions shall be reckoned as comprehended in the provision of the article 2d, of the law of colonization of the 18th of August, of 1824, and shall be considered as property of the reductions of the neophytes, catechumens, and Mexicain settlers, and insusceptible of other distribution than among themselves.

"3. For the admission of the colonization of foreigners in the part occupied by the republic, the previous approbation of the supreme executive general power will be necessary; it being considered that there is not capacity in the land which remains free, under the provisions of the foregoing articles, to distribute any to foreigners in the littoral and limitrofal distances, which article 4th of the said law of colonization mentions, and which should be rigorously observed in the territories of both Californias, as well with respect to its exterior coasts as its interior ones, and in the limitrofal points with the tribes or nations of native gentiles.

"4. The supreme executive general power shall only give its approbation to the distribution to foreigners of lands which are absolutely known to be vacant in the part occupied by the republic, when the said foreigners may be capitalists or operative agriculturists.

"7. The right any foreigner may have to denounce lands which are recognised as absolutely vacant in the part occupied by the republic, shall be limited to the boundaries designated in the articles 3 and 4; and, in this case, it shall commence to reckon from the day in which, conformably to the agreement in the article 5, he is established in that settlement; besides, submitting himself to the measures and forms established by law.

"8. The contracts that foreigners may propose for one or more new settlements shall be regulated to the principles established in the foregoing articles, and to that which is provided with respect to the Mexicain settlers.

"28. No foreigner or private person shall be able to make an entrance, acquisition of territorial property, nor establish any commerce with the gentiles, without previous permission of the supreme government; which shall grant it, according as the general Congress shall determine, in use of faculty 11, which is conceded in article 50, of the federal constitution, and with a preceding examination of the advantage which may result from it, as well to the native gentiles as to the public, holding to be still in force in this respect, law 4, tit. 1°, lib. 4°, of the municipal laws.

"MEXICO, *April* 21, 1825."

REPORT ACCOMPANYING A PLAN FOR DOMESTIC COLONIZATION.

[*Extracts.*]

"MOST EXCELLENT SIR:

"The junta, desirous of fulfilling the offer which it made to your excellency when the project of regulations for colonizing foreigners in California was passed into your hands, has formed that which now accompanies for Mexican colonization or population of the said territories.

"The junta, accommodating itself to the slight notices which it has been able to collect of those territories, have proposed in the regulation—First, that the national colonization and population be efficiently aided in that peninsula as the means most proper and apt for the republic to preserve that most important point, and enjoy the incalculable advantages which it is capable of affording. Second, that the new settlements shall be established without prejudice to the catechumen-neophytes, ancient Christians, and settlers existing in that county; and the third, that this increase of population shall facilitate by good treatment, communication, commerce, and amicable relations the reduction of the numerous gentiles, and their incorporation in the territories which the Mejicain Republic occupies. . . . . . .

"The junta has extended the calculation of the said estimates to a hundred families transferable to Upper California, by the observations which they made in the 2d article of the *acta diversa,* also copied from 2d of the present month; and although there is not all the necessary knowledge of the disposable lands in that territory according to the provisions of the projected regulations, it is not doubted that there is room for a hundred families, accommodating them with the discretion that the same regulation provides in reference to the climate in the lands nearest San Francisco, Monterey, Canal de St. Barbara, and San Diego.

Regulation for the colonization for families of the Federal States of Mexico, in the territories of California.

[NOTE.—The first and second articles are the same as those of the foregoing plan of domestic colonization.]

ART. 3. In the lands actually occupied by the missions, all that is absolutely necessary shall be separated for the occupation and commodious subsistence of the catechumens and neophytes, who are to be maintained in common, having consideration to the number of gentiles who may be added to the missions.

4. In the lands remaining, shall be distributed in preference to all other persons, to the native Indian Christians who may be ready for self-government, the land they are considered capable of cultivating.

5. To those natives shall be given for their subsistence, and for its cultivation, the same aids proposed for a certain number of settlers and Mexican colonists.

6. To the natives who prefer to exercise themselves in other offices and works than the cultivation of the land, aid shall be given, also land for a house-lot the same as assigned for a like number of Mexican settlers of that class.

7. To the individuals and families who are settlers in the pueblos and missions of the territories of the Californias, the lands which have been given to them according to the regulation of the 1st June, of 1779, which prevails in that peninsula. [The regulation here referred to is that of 1781 before referred to; it was prepared in 1779, and approved by Royal decree of 1781.]

8. To those to whom no division at all has been made, and who lack other territorial property, shall be distributed the land they are considered capable of cultivating.

10. In the remaining lands there shall be made to the Mejicain citizens, who shall be removed to the California territory, with preference over all foreign colonists, a distribution conformable to the provisions of the following articles.

11. To promote the Mejicain population in California there shall be conceded to a certain number of settlers of Mexican colonies the following aids. [The aids here specified, consisting of money, agricultural implements, &c., are omitted.]

16. When the settlers who have removed to California do not designate the mission or town in which they wish to establish themselves, care will be taken to distribute them in climates, and temperatures analogous to those of their birth.

17. Any Mejicain, though not domiciliated in the territory of this republic, can, by himself, or forming a company with Mejicains, contract for the establishment of one or more new settlements in vacant lands; to do which he shall present his new project of settlement to the political chief of the territory in whose district the land is in which he wishes to establish it. The respective political chief shall examine the project presented, and, finding it to conform to the laws in force, or rectifying it according to them, shall approve of it, and have it carried into effect, giving notice to the government for its approbation.

18. The political chiefs of the territories can admit no contract whatever for a new settlement, unless the contractor bind himself to present in the character of settlers for each one at least twelve families, that is, twelve married free men. The respective political chief shall signify to the contractor a fixed time in which he shall present in the new settlement the number of families for whom he has contracted, under penalty of losing, in proportion, the rights and privileges offered in his favor in the contract, and this to be null.

21. Shall be admitted with the greatest frankness compatible with the dispositions of the laws in force, the contracts that may be proposed for the settlement of the islands adjacent to the peninsula of California.

24. The right to denounce lands in the Californias shall commence to be reckoned to the Mejicain citizen from the day, that conformably to provision in art. 17, he remains domiciliated in those territories, subjecting himself in other respects to the measures and forms established by law.

B.

PROCEEDINGS IN THE CASE OF GARCIA *vs.* BONE.

MOST EXCELLENT SEÑOR GOVERNOR: Francisco Garcia, native of this department, and resident of the jurisdiction of the Pueblo of San José, before Y. E., in the proper form of law, says, that in 1842, needing a tract for the increase of the stock he possesses, he concluded the treaty shown in the document which duly is sent herewith to Y. E., by which he purchased from Thomas Bone the place named "Cañ da de San Felipe y las Animas," under the supposition that he had acquired in it the legal right, and that he was able to sell it; but knowing now by informed persons that Bone, when he alienated the tract to which I refer, was not master of it, because in three years which passed he had not built, nor cultivated, and that he was in no manner authorized to sell it: I have come to supplicate Y. E. to exonerate me from the obligation under which I still find myself by reason of the before cited contract, because I have not finished paying what I offered to Bone, for the right with which mistakenly I considered he had in the said land. Likewise denouncing this in all form as vacant in respect of Bone, and in consideration that I have established in it some works, and of the outlay which I have unjustly made in favor of Bone, I have some merits that the wise justice of Y. E. will concede to me in property the tract in the same extent which the title I have in my power designates, and which also I respectfully transmit: Wherefore, I implore Y. E. to deign to take into consideration both petitions, of which favor I shall live grateful, swearing what is necessary, &c. Monterey, August 1, 1844.

(Signed) FRANCISCO GARCIA.

MONTEREY, *August* 1, 1844.

Let the secretary of the despatch report, taking other (reports) if he shall need them.

MICHELTORENA.

MOST EXCELLENT SEÑOR GOVERNOR: I do not find any objection why the interested party should not occupy as his own the tract named San Felipe, by the right which Don Tomas Bone ceded to him; but as to exonerating him from the payment in which the resident Francisco Garcia purchased, I believe it belongs to the superior tribunal to resolve, there having been executed a writing respecting the sale of the tract to which I refer. The superior judgment of Y. E. will be that which is most proper.

Date the same.

MANUEL JIMENO.

MONTEREY, *August* 1, 1844.

Conformably in all respects with the preceding report, I declare for his own the tract to the petitioner; and as to the second part, in respect to the payment of that contracted before the judge, the title not having the condition, he could not transfer or sell it, &c., let it be directed to the superior tribunal for its resolution.

MICHELTORENA.

SUPERIOR TRIBUNAL OF JUSTICE.

Let the Señor Judge of the Pueblo of San José report whether from the 7th of August, 1839, in which by superior title was conceded the tract known by the name of the Cañada de las Animas, and San Felipe, to Don Tomas Bone, it has been without enclosure, house, planting, or cultivation up to the 7th of October, 1842, when he transferred it by sale to Don Francisco Garcia. Monterey, August 2, 1844.

On account of the sickness of the Señor President,

(Signed) JOSE MARIA CASTAÑARES.

In fulfilment of the foregoing superior decree, I have to say that the tract conceded to Don Tomas Bone has never had improvement of house, cattle-pen, or enclosure, until in the month of December, of the past year, Don Francisco Garcia made a cattle-pen, which exists at present, with which I believe I have given due fulfilment. Pueblo of San José, August 8, 1844.

(Signed) ANTONIO MARIA PICO.

MONTEREY, *September* 12, 1844.

As the contract made between Francisco Garcia and Tomas Bone appears perfected by the delivery which the first made to the second of a part of the value in which he purchased, and the occupation of the tract by him, Bone not having been reconvened for the sale which he made, the petitioner cannot be exonerated of the payment; and of that which he owes to Bone, although it is true that he in three years did not occupy the tract, and therefore, according to the title which he had, lost his right; so likewise it is, that both contracting parties having consented in the delivery and receipt without there having been interposed any denouncer of the land, the seller made use of that which with just title he had acquired, and in such view Garcia is obligated to pay Bone.

Pass this to the Judge of San Jose that he may notify both parties, returning all to him who petitions.

(Signed) MALARIN.

C.

INSTRUCTIONS AND POWERS OF MICHELTORENA.

*Instructions.**

Con fecha 11 de Febrero de 1842, me dice el E. S. Ministro de la Guerra y Marina lo que copio: "E. S. Deseando el E. S. Presidente provisional de que en el Departamento de Californias se promuevan todos los recursos que tiene para prosperar y ponerse en defenza y en el estado de felicidad al que aun la misma naturaleza le invita; teniendo en consideracion los sucesos que ha habido en el pais y que por la distancia no ha podido evitarlos el Gobierno Nacional; la situacion en que V. E. va ā encontrarse y las medidas que tendrā que adoptar, cuyas consultas no surtirān efecto, sí aguardan el tiempo necesario para su resolucion; que hay asuntos en los que el mas pequeño retardo no proporciona el remedio; y confiado en que V. E. no absuará del poder y que el que se le concede lo empleará en bien del servicio y de todos los habitantes del interesante y feraz Departamento que el Gobierno Supremo ha puesto ā su cargo y responsibilidad, se ha servido conceder ā V. E. ademas de las atribuciones que le demarcan las leyes y ordenanzas vigentes, como Gobernador, Comandante general ē Inspector, todas las facultades que puede delegarle el Gobierno Supremo para que en uso de ellas, remueva ā los empleados civiles y militares dependientes de ēl, que no correspondan ā sus deberes y ā la confianza del mismo Supremo Gobierno, reemplazandolos con ciudadanos dignos que entrarān al ejercicio de sus destinos, sin perjuicio de que V. E.

Translation.†

Under date of the 11th February, 1842, the Minister of War says what follows:

"Most Excellent Sir: His Excellency, the President *ad interim*, being desirous that the Department of California should take advantage of all the resources which it possesses for its prosperity, for placing itself in a state of defence, and for acquiring that happiness which nature itself invites her to take possession of; and bearing in mind the disturbances which have taken place in the country, and which, on account of the distance, the National Government has not been able to avoid; the situation in which Y. E. will be placed and the measures which you will have to adopt, and which will produce the desired effect if you wait for the proper time to put them into execution, for there are matters which do not admit of the least delay, and in the persuasion that Y. E. will not abuse your powers, but that you will exercise them for the welfare and service of all the inhabitants of that interesting and fertile Department which the Supreme Government has placed under your charge and responsibility, he (the President) has been pleased to grant to Y. E. over and above the attributions assigned to you by the existing laws and regulations, as Governor, Commandant General, and Inspector, all the powers which the Supreme Government can confer upon you, in order that by virtue thereof you may remove from office all such civil and military officers dependent

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* I have received this copy through the courtesy of Captain Halleck. It is taken from a copy communicated by Micheltorena to Don Pablo de la Guerra, then Administrator of Customs at Monterey, and was subsequently proved in a case before the commission.

† This translation was made by Mr. Hartnell, as I suppose, when he was government translator, in charge of the archives. I copied it, by permission, from a document in the archives, in February, 1851, when they were in charge of Major Canby, at Benicia.

dará cuenta para la aprobacion suprema con las causas de sus procedimientos. Las miras del Supremo Magistrado no solo se reducen á la Alta California, sino que tambien se estienden á la Baja, en cuya demarcacion han aparacido conatos de eccision que fomentados por enemigos ocultos, han hecho que tomen parte algunos estraños, que su mismo origen les prohibe el ingerirse en querellas domesticas; y como este resuelto á proteger á las tropas, autoridades y vecinos de la mencionada peninsula, ha resuelto, que al mando militar de V. E. se estienda á dicha Baja California como está en lo politico; separando lo de él de Sinaloa, sin embargo de que el Señor Comandante General de los Departamentos de Sonora y Sinaloa, continuará impartiendo á V. E. los recursos y aucilios de que hubiere menester por asegurar la paz, para socorrer las tropas, para proveer al vecindario y por hacer que toda la demarcacion prospere y sea feliz. Aunque el art. 1, de 2 de Noviembre, de 1839, derogó los articulos del de 18 de Febrero de mismo año que sugetaban á la dependencia de la Plana Mayor del Ejercito, y el 13 del primer decreto citado solo se deja á los Commandantes Generales de los Departamentos de Oriente y Occidente con las antiguas atribuciones inspectores que tenian en las companias presidiales, el E. S. Presidente referido ha resuelto, que las facultades de V. E. se estiendan como inspector al Batallon fijo de Californias y que en todo lo relativo obre en mecanica y se entienda con la Plana del Mayor Ejercito. Va V. E. á esperimentar el arreglo ó desorden en que se encuentran las aduanas maritimas de Ambas Californias: tiene la necesidad de ecsaminar la situacion que guardan todas las misiones en su gobierno, adelantos y ramo de contabilidad; tiene que proceder á la inspeccion y reorganisacion de las compañias presidiales, y para toda debiera dejar ecsistente el mal mientras que se resolvia la consulta. El Gobierno Supremo confiando en la justificacion y actividad de V. E. quiere desde luego que el daño se evite, que el bien se establesca, y que desde luego ningun obstaculo lo impida, y por lo mismo, las facultades que delega en V. E. las hace estensivas á estos ramos y á cuantos mas puedan contribuir á la dicha del pais contando entre sus ramos la administracion de correos, la colonisacion, el establecimiento de Presidios, la mejora de los puertos, la seguridad de los Pueblos, la civilisacion de los salvages, la educacion de la juventeed, la apertura de caminos, el fomento de las artes, la proteccion de la agricultura y el comercio, el establecimiento de casas de correccion y el hornato de las poblaciones. Conoce V. E. las miras del Gobierno Supremo; sabe muy bien que amigo del progresso solo anhela por la union entre

on said Government who shall not fulfil their duties or act up to the confidence resosed in them by the same, and fill their pituations by appointing worthy citizens who shall take their places and enter upon their duties, but with the understanding nevertheless that you report to Government the motives of your proceedings for its approbation. The views of the Supreme Magistrate do not only refer to Upper California, but extend likewise to Lower California, where certain seditious movements have appeared, which being fomented by hidden enemies, it has caused some foreigners to take part when their very quality of foreigners prohibits them from intermeddling in domestic strife; and as the President is resolved to protect the troops, authorities, and citizens of said peninsula, he has determined that your military command shall likewise extend to Lower California as well as the civil command, separating it from Sinaloa, and the Commandant General of the Department of Sonora and Sinaloa will continue to furnish you with the resources and assistance which you may require for the purpose of securing peace, furnishing the troops, providing for the wants of the citizens, and enabling you to provide for the prosperity and happiness of the whole Department. Although the first article of the law of 2d November, 1839, derogated the articles of that of the 18th February of the same year, which subjected the subordination of the staff of the army, and the 13th article of the first mentioned decree merely leaves the Commandant General of the East and West with the former attributions of Inspector, which they possessed in the Companies of the Presidios, His Excellency, the President, has determined that your powers shall extend as Inspector to the permanent Battalion of California, and that you take charge of all the mechanism thereof, and report to the staff of the army. You will become acquainted with the good or bad management of the Marine Custom-houses of both Californias; you will have to examine the situation of all the Missions with respect to their management, improvement, and state of accounts; you will have to proceed to the inspection and reorganization of the companies of Presidios, and in all cases (were you not to act) the evil would have to remain until Government could resolve. The Supreme Government trusting in your justice and activity, desires that you should meet with no obstacles, and therefore the powers conferred upon you are made extensive to those branches, and to all others which may conduce to the welfare of the country, including, amongst others, the administration of the Post Office Department, Colonization, the establishment of Presidios,

los Mejicanos, y por que todos los pueblos disfruten el amparo de las leyes y una libertad tan estensa que solo la limite el acatamiento á las leyes, la obediencia á sus autoridades, y el deber que tenemos para procurar el bien y evitar á todos se les haga perjuicio. En esta virtud no me detengo en recomendarle propague estos principios y unicamente le advierto que al dictar sus instrucciones el Supremo Magistrado ha querido manifestar á V. E. su aprecio y la entidad del gobierno que le confia y a los habitantes de Californias el acreditarles que la presente administracion desea su dicha, desconoce la apatia, y esta pronta á impartir en favor de aquel Departamento todos cuantos recursos apetesca y pueda proporcionarle. Los dignos militares que marchan á las ordenes de V. E. van á prestar un servicio en favor del territorio nacional digno sin duda de la gratitud publica; los habitantes de aquel Departamento van á esperimentar en ellos un modelo de honrades, de subordinacion y disciplina, y para que se acrediten estas honorificas calidades es indispensable que V. E. les recuerde continuamente que su residencia no va á ser en unos pueblos que si bien carecen sus habitantes de la civilisacion de cortesanos, tambien es verdad que son dociles, hospitalarios, amigos del bien, y susceptibles de aprovechamiento y libres de ese contagio que tambien perjudica en las grandes poblaciones en donde corrompide la moral, solo se enseña á criticar acciones inocentes que debieran servir de buen ejemplo."

Lo que trascribo á V. para su inteligencia y fines consiguientes.

Dios y Libertad.

Enero 10, de 1843.

MANUEL MICHELTORENA.

So'r Admor. de la Aduana Maritima de Monterey.

the improvement of Ports, the safety of Towns, the civilization of wild Indians, the education of Youth, the opening of Roads, the furtherance of the Arts, the protection of Agriculture and Commerce, the establishment of Houses of Correction, and the establishment of Towns.

You know the views of the Supreme Government, and are well aware that being a friend to improvement, it merely desires the union of Mexicans, and that the community in general may enjoy the protection of the laws, be obedient to their authorities, understand that it is our duty to procure the welfare of every one, and avoid that all others be injured. I, therefore, will not detain myself by recommending you to propagate these principles, and will merely mention that when the Supreme Magistrate dictated his instructions, he wished to manifest to you his esteem, and the importance of the command he has confided to you, and to assure the inhabitants of California that the present administration desires their happiness, disavows all apathy, and is ready to impart to that Department all the resources which it may desire and be able to furnish it.

I communicate this to Y. E. for your satisfaction. God and Liberty. Mexico, 11th February, 1842=Tornel.=To General Don Manuel Micheltorena.

I certify, that the foregoing copy is the same as the one that was copied from the original when I was in charge of the Governor's Secretaryship.

Monterey, July 6, 1850.

(Signed) MANL. JIMENO.

D.

EXTRACTS FROM THE DECREE OF MICHELTORENA, 29 MARCH, 1843.*

One of the ample instructions with which the undersigned, General and Governor, finds himself invested, being that of examining the positions the Missions maintain, in their administration, improvements, and liabilities, and to regulate the same; and the National Supreme Government having invested him with all its powers, as shown in the supreme order of 11 February, 1842; in accord and with consent of the most Reverend Father Friar José Joaquin Jimeno, Friar José de Ma. de Jesus Gonzales Rubio, whom to that end I caused to be called before this Government, as well as the Presidents of the other Missions, and in the name and representation of the most Reverend Father President Vicar Foraneo Friar Narciso Duran; being informed of all that was necessary; and considering that the vast and immense lands formerly property of the Missions have been distributed to private individuals, at a time when it was made one of the exigencies of the country; that those pious and beneficial establishments are reduced nearly to the gardens and grounds of their temples and edifices; that the most Reverend F. Ministers have no means of subsistence except mercenary, and that the divine worship, without prospering, is scarcely maintained; that the Indians, by their natural reluctance to labor, suffer from scantiness of food, and nakedness—those not in private employment, or subjection, preferring to flee away and die impenitent in the woody deserts, dragging out a life of slavery, full of privations, and without any of the social enjoyments; that the continual emigration of natives from private individuals to the Missions, and from the Missions to private individuals, and to the wilderness, more and more hinders agriculture, and instead of attracting the heathen, drives them away from the bosom of our Holy Religion; that in the administration of the Missions some frauds and notorious abuses have been committed, which all the inhabitants of the country lament; and that there are no other means to reanimate the skeleton of a giant, which the remains of the ancient Missions are, than to have recourse to experience and to sustain them with the levers of the civil and ecclesiastical powers; all having been considered and prudently weighed, I have thought proper to resolve the following articles:

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*The original of this decree exists in the archives, in charge of the Surveyor General of the United States in California.

Article 1. The government of the Department will order the Missions of San Diego, San Luis Rey, San Juan Capistrano, San Gabriel, San Fernando, San Buenaventura, Santa Barbara, Santa Cruz, La Purisima, San Antonio, Santa Clara, and San José, to be delivered up to the very reverend fathers whom the respective prelate may appoint to each of them, and said Missions shall in future continue to be administered by the very reverend fathers, as tutors to the Indians, in the same manner as they held them formerly.

Article 2. As policy makes irrevocable what has hitherto been done, the Missions will not claim any lands already granted up to this date; but they will collect the cattle, property, and utensils, which may have been lent by the priests or administrators, settling the time and manner in a friendly way with debtors or holders.

Article 6. The departmental government, which prides itself in being religious, and at the same time entirely Californian, and as such, interested in the same manner as each and every one of the inhabitants of both Californias, in the progress of the Holy Catholic Faith, and prosperity of the country, offers all its powers for the protection of the Missions, and, as Commandant General, the force of arms to escort, defend, and sustain them, as it will likewise do in respect to individual and private property, and guaranties, securing to the owners thereof the possession and preservation of the lands which they this day hold, and it undertakes not to make any new grants, except on information of said authorities, of the reverend fathers, or where the lands are notoriously unoccupied, or in case of necessity.

E.

Act of the Territorial Deputation of California, 12 May, 1834, in relation to the Missions. (Mss. Archives.)

First. The vacant lands shall be distributed according to the Laws of Colonization.

Second. The Political Chief shall order a suspension of the extensive slaughterings of cattle which are taking place at the Missions, and will only permit the same in case of urgent necessity.

4

SUPREME COURT OF THE UNITED STATES.

December Term, 1853.

No. 120.

The United States,
at the suit of
Cruz Cervantes, *Appellant.*

BRIEF FOR THE UNITED STATES, PART FIRST: PRELIMINARY QUESTIONS.

C. CUSHING,
Attorney General.

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1853.

No. 120.

UNITED STATES, *Appellee*,
At the suit of
CRUZ. CERVANTES, *Appellant*.

FROM THE NORTHERN DISTRICT OF CALIFORNIA—ON MOTION TO DISMISS THE APPEAL.

The present case is the first in the order of the calendar, and a leading one as to the questions of law involved, among the appeals to this court from the district courts of California, under the act of March 3, 1851, entitled 'an act to ascertain and settle the private land claims in the State of California,' (ix Stat. at Large, p. 631,) and the provisions in addition thereto contained in the 12th section of the act of August 31, 1854, entitled 'an act making appropriations for the civil and diplomatic expenses of the Government for the year ending the 30th of June, 1853, and for other purposes,' (Session Acts, 1851–'52, p. 99.)

It opens to the court the whole field of the legislation of the Mexican Republic, and the action of the local authorities in the Territory of Upper California, in regard to land titles in that Territory prior to the time of its cession to the United States; so that the novelty of the questions raised by the case, and the magnitude of the interests at stake in it, require and justify the most careful discussion and investigation.

Many of the questions presented by the Record and by the Brief for the appellant, are preliminary merely, wholly independent of the merits, not calling for or admitting any light from the laws of Spain, or of the Mexican Republic, and exclusively dependent on the consideration and construction of the Constitution, of acts of Congress, and of the familiar doctrines of the ordinary jurisprudence of the United States.

It seems convenient to consider all these questions by themselves separately, and they are accordingly so submitted in the present Brief.

The preliminary questions in this case arise upon the motions made in the district court of the United States for the northern district of California, to dismiss the appeal prosecuted by the

United States, from the decision of the court of the land commissioners for California, which had affirmed the title of Cruz Cervantes to the land in question.

In that court the counsel for the claimant, Cruz Cervantes, make five points of objection to jurisdiction of the District Court of the United States, for the Northern District of California.

I. That the District Court for the Northern District of California had not jurisdiction of the land, or the defendant.

The act of 28th September, 1850, ix Stat. large, by L. & B. p. 521, chap. 86–'7 divides the State of California into two judicial districts, called the Northern and Southern,—"divided by the thirty-seventh parallel of North latitude."

Whether this tract of land, claimed by Cervantes, is situated in the northern district, or in the southern district, is a question of fact; not a question of law.

By the 9th sec. of the act, approved March 3d, 1851, (ix Stat. at large, by L. & B., p. 332, chap. 41,) as well as by the act of 31st August, 1852, (Session acts, by Little and Brown, p. 99, sect. 12,) the appeal from the final decision of the commissioners is given "to the district court of the district in which the land claimed is situated;" and the commissioners were required to have two certified transcripts of their proceedings, and decision, and of the papers and evidence, prepared,—"one of which shall be filed with the clerk of the proper district court, and the filing of such transcript shall *ipso facto*, operate as appeal for the party against whom the decision shall be rendered;" * * *

The commissioners caused the transcript to be filed in the district court for the northern district; and the district court for the northern district upon motion to dismiss, (p. 99, 100, 101, 4th point,) decided the fact that the land was within the jurisdiction of the northern district.

The decision of the district court must be presumed to be right, until there be affirmative proof that it was erroneous. There is nothing in the Record to show that it was erroneous. There is not a particle of proof in the Record to show that the land claimed by Cervantes, is situated south of the thirty-seventh parallel of north latitude.

The claim of Cervantes is described in the petition, (printed Record, p. 1,) as situated in the county of Santa Clara, and known by the name of San Joaquin or Rosa Morada, bounded on one side by the Arroyo of San Felipe, on the second side by the hills or mountains of San Joaquin, on the third by the Arroyo of Santa Anna, and on the fourth, by a line drawn through the plain of San Juan.

The county of Santa Clara is to be seen on the map of California; the thirty-seventh parallel of north latitude leaves by far the greater part of the county north of that parallel of latitude, if not the whole. The land of Cervantes is not represented on the map. Under such circumstances it would be rash to presume that the tract of two square leagues, claimed by Cervantes, was situated south of the line, against the acts and knowledge of the commissioners and the judge of the district court.

The question of fact whether the land claimed by Cervantes was situated in the northern or in the southern district, was comprised in several motions made by his counsel—all of which were overruled.—Printed Record, p. 9 and 100–102, point 4.

The motion to dismiss "because the land in controversy in this case is not within the territorial jurisdiction of the court," brought the fact of its locality directly in issue. The court decided the fact against Cervantes; nothing is in the record to authorize this court to reverse the decision upon this question of fact. The mover has embodied no evidence in the record to prove to this court that the decision of this question of fact by the district court was erroneous.

This motion to dismiss "because the land in controversy is not within the territorial jurisdiction of the court," and the overruling thereof, are equivalent to a plea to the jurisdiction founded on the locality of the tract of land, and the finding of the fact against the plea: to reverse that finding there is no evidence in the record.

This thirty-seventh parallel of north latitude through the State of California has not been run, and visibly marked upon the ground, by the constituted authorities of the United State. Therefore, whether a particular tract of land of two squares in the county of Santa Clara was in the northern or in the southern judicial district, was a matter of reputation in the neighborhood and with the courts, until otherwise ascertained and proved by scientific experiment and demonstration.

By the fourth section of the act of 1850, which created the northern and southern judicial districts in California, "the judge of the northern district shall hold two regular sessions, annually, at San Francisco, and one regular session, annually, at San José, Sacramento, and Stockton;" and San José is in the county of Santa Clara.

The board of commissioners, for ascertaining and settling private land claims in California, have, in performing their duty prescribed by the 12th section of the act of 1852, caused a certified transcript of their final decision for this land to be lodged with the clerk of the northern judicial district; the judge of that northern judicial district has received the transcript, and heard the appeal, and decided the question of jurisdiction.

The decision of the district court must be presumed to be correct, until the contrary be proved.

The jurisdiction of the court did not depend upon the person of Cervantes, but upon the act of commissioners in causing the record of their final decision to be lodged with the clerk of the district court.

II. "It is alleged that the action was not brought nor presented in the court below in the manner nor within the time prescribed by law."

Under this head various objections are specified:

1. It is said "the act of 1852 did not intend to change the *mode* of reviewing the decision of the commissioners."

To this the answer is, that the said 12th section of the act of 1852, as to the *mode* of reviewing the decisions of the court of commissioners, is so different from the mode prescribed in the act of 1851, and so repugnant in the very matter, as that the two cannot be reconciled. Therefore the maxim applies, "*Leges posteriores priores contrarias abrogant.*"

2. Another objection, under this head, that "it was not competent for Congress to establish a jurisdiction in the Federal courts by way of *appeal* from the commission," is repeated, as the particular subject of the third general head, and will be there answered.

3. Another objection is, that "Fisher, signing himself secretary, was not an officer known to the law, or whose certificate could verify any proceeding to a judicial tribunal."

The answer to this is, that the second section of the act of 1851, authorized the commissioners to appoint their secretary, "whose duty shall be * * * to keep a record of the proceedings of the board in a bound book, to be filed in office of the Secretary of the Interior on the termination of the commission;" and by section eighteen it is seen, that it is the duty of the secretary of the board to furnish "certified copies of any paper or record," and his fees therefor are prescribed; and by the twelfth section of the act of 1852, it is the duty of the commissioners "to have two certified transcripts prepared of their proceedings and decision * * * one of which transcripts shall be filed with the clerk of the proper district court, and the other shall be transmitted to the Attorney General of the United States, and the filing of such transcript with the clerk aforesaid shall *ipso facto* operate as an appeal for the party against whom the decision shall be rendered;" * * * Upon these two acts, made in *pari materia*, the secretary of the board, who is the keeper of the records, is made the proper officer to certify all transcripts of all copies of the record.

4. It is objected, that "the notice addressed by the Attorney General to the clerk of the court, did not operate as a notice in regard to this appeal, it not having been then instituted."

The notice by the Attorney General (p. 98) bears date, 11 July, 1853. It correctly describes the case of "Cruz Cervantes *vs.* United States," and gives notice that "the appeal in the above case from the decision of the commissioners to ascertain and settle the private land claims in the State of California, to the district court of the United States for the northern district of California, will be prosecuted by the United States." This description is full, identical, and sufficient to apply to the transcript of the final decision of the case, upon the record thereof when filed with the clerk of the district court on the 22d of July, 1853. The idea is, that as the notice by the Attorney General bears date at Washington, D. C., July 11th, 1853—and the transcript of the record was not filed with the clerk of the district until 22d July—that the notice is insufficient. But the decision had been made by the commissioners in December, 1852; the transcript had been transmitted to the Attorney General, who correctly described the case in his notice of appeal. That is sufficient. By the time the written notice of the Attorney General had been conveyed from the city of Washington to the clerk of the northern judicial district of California, the transcript of the record of the decision of the commissioners must have been filed with the clerk; inasmuch as by no means of conveyance, between the city of Washington and the city of San Francisco in California, yet known and used, could the Attorney General's letter have been transmitted to the clerk at San Francisco before the 22d July, 1853.

5. Another objection is, "that if the case was properly brought, however, it was not properly prosecuted; it ought to have been prosecuted either by a *citation* to Cervantes, or else according to the provision of the act of 1851."

To this objection it is a sufficient answer, that the appeal was prosecuted in conformity with the said section 12, of the act of 1852. That act required no citation to Cruz Cervantes, he was bound to take notice of what was done in that respect in the clerk's office, and accordingly appeared and defended the appeal.

6. Another objection is made, (appellant's Brief, p. 4, 2 of second head, as to time,) that "the act of 1852 intends that the appeal for which it provides, shall be instituted within the same period (six months) as is provided in the act of 1851."

The 12th section of the act of 1852, August 31, (Sess. Acts by Little & Brown, p. 99, chap. 108,) is an express refutation of this objection.

Neither does that act require "that appeals shall be prosecuted to the term of the appellate court next following the institution of the appeal." The 12th section of the act of 1852, was duly observed in the prosecution of this appeal.

7. Another objection under this head is, "that the act of 1852 does not apply to this case only, but relates to decisions which shall be rendered, not to such as had been rendered; and the decision in this case was rendered on the 3d August, 1852, twenty-eight days before (the act of 1852) it was adopted.

To this the answer is, that the appeal is from the final decision of the commissioners, not from an interlocutory one. The decree alluded to as of 3d August, 1852, (printed Record, p. 5,) was but interlocutory, not final; "the entering of the decree of final confirmation being reserved for a future day."

The final decision was pronounced December 18, 1853, (printed Record, pp. 49, 50,) in which it will be seen that the question was held in reserve whether the claimant should hold all the land within the exterior boundaries alluded to, or only the quantity of two square leagues; and the final decision confined him to the exact quantity mentioned in the grant.

III. It is objected that "the court below could not have appellate jurisdiction in the premises;" that the commission established by virtue of the act of 1851 is not a court under the Constitution, and consequently not the depository of any portion of judicial power: that the act was not passed in virtue of any legislative authority, express or implied, possessed by Congress, and consequently does not rank as *a law.*

These propositions imply, that a *case* or *controversy*, in the constitutional sense, could not arise before the commissioners, of which an act of Congress could confer jurisdiction by way of appeal to the federal courts, and that the act of 1852 is not constitutional; that the act of 1851 was enacted, "not in the public or law-giving capacity of the state, but in its private capacity as landholder, in virtue of the judiciary functions of Congress given in the second clause of the third section of article 4 of the Constitution, and this does not confer legislative, but administrative powers."

Such are the objections made by the counsel for the appellant in this court, stated in their own words, in order to avoid misrepresentation.

The first article and eighth section of the Constitution of the United States ordains that the Congress shall have power to legislative on various subjects therein mentioned, among which is the power "to constitute tribunals inferior to the Supreme Court;" and concludes thus: "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department officer thereof."

The third section of article fourth ordains: "The Congress shall have power to dispose of and make all needful rules and regulations respecting territory or other property belonging to the United States."

The motion to dismiss the appeal supposes that the act of 1851, (Vol. IX, p. 631, chap. 41,) entitled "An act to ascertain and settle the private land claims in the State of California," which establishes the commission to hear, examine, and decide the claims of all persons to lands in California, derived from the Spanish or Mexican Government, with all the rules and regulations contained in the eighteen sections thereof, proceeds solely and exclusively from the power given to Congress, by the third section of the fourth article, "respecting the territory or other property belonging to the United States."

But the act of 1851 makes the board of commissioners a tribunal of record, with a secretary "to be appointed by the said commissioners" to authenticate the proceedings of the commissioners; with clerks "to be appointed by the commissioners;" with a person learned in the law, "to be appointed by the President of the United States," to attend before the board to the interests of the United States; it makes it the duty of each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican Governments, to present the same to the commissioners when sitting as a board, "with such documentary evidence, and testimony of witnesses, as the claimant relies upon;" it authorizes the agent of the United States "to collect testimony in behalf of the United States, and to attend on all occasions when the claimant * * shall take depositions;" it authorizes the commissioners to issue writs of subpœna for witnesses, to administer oaths, examine witnesses, take depositions; to be attended by a deputy marshal; the commissioners as a board are authorized to hear, examine, and decide upon the validity of each claim presented, according to the evidence and the laws applicable to the case, and particularly according to the treaty of Guadalupe Hidalgo; the decisions and proceedings are to be recorded; and, on the expiration of the commission, the records to be filed in the office of the Secretary of the Interior. The act provides for a review of the decisions of the commissioners, first before the district court of the United States, and finally before the Supreme Court of the United States.

Upon looking at the various sections of this act, it is apparent that it constitutes a judicial tribunal, to hear and determine between the United States and individuals, on claims to land in cases arising under the treaty, between the United States and Mexico, of Guadalupe Hidalgo, with the allowance of appeals to the ultimate decision of the Supreme Court of the United States. It is therefore self-evident, that this special tribunal was not established solely and exclusively "in puursuance of the administrative and fiduciary powers of Congress, as custodian and agent of the lands and other property of the United States," as delegated by the third section of the fourth article; but that it may also, and more properly, be traced to the powers given to Congress by the eighth section of the first article, "to constitute tribunals inferior to the Supreme Court," and to the powers given by the same section, "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

It has reference, also, to the second section of the second article: "But the Congress may by law vest the appointment of such inferior officers as they think proper, in the President alone, in the courts of law, or in the heads of departments;" for Congress vested the appointment of the law agent in the President alone, without the advice and consent of the Senate, and the appointments of the secretary and clerks in the court of commissioners.

It has just relation, also, to the powers of Congress to make laws necessary and proper for carrying into execution the treaty of Guadalupe Hidalgo.

It has, also, connexion with the judicial power of the United States, which, by Art. III, § 2, "shall extend to all cases in law or equity arising under the Constitution, the laws of the United States, and treaties made, or which shall be made under their authority."

It has likewise connexion with another paragraph of the same section, which, after defining the original jurisdiction of the Supreme Court, ordains that "in all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."

Taking into view the various provisions of the act of 1851 to ascertain and settle private land claims in California, it seems clear that the legislation by Congress, in instituting the commision to hear and determine the validity of the private land claims in California, does not depend solely and exclusively upon that section of the Constitution which ordains that "the Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States;" but that the said legislative act of Congress proceeded from the powers vested in the Government of the United States, by articles one, two, three, five and six, of the Constitution; that the said board of commissioners is a judicial tribunal, a court of record, instituted "by the Government of the United States in its political and governmental capacity."

Again it is supposed—(printed Record, p. 101–108, sec. 9)—"this court cannot have appellate jurisdiction from a tribunal constituted otherwise than according to sections one and two of article third of the Constitution, unless by consent; and such consent is not given in this case."

The meaning of the objection is, that the Congress cannot authorize an appeal to a court of the United States, unless it be from another court of the United States, established under the third article, of permanent duration, holden by a judge or judges appointed by the President of the United States, during good behaviour," receiving a "compensation, which shall not be diminished during their continuance in office."

That is also a clear misinterpretation of the Constitution of the United States. The judicial power of the United States "shall extend to all cases in law or equity arising under this Constitution, the laws and treaties made, or which shall be made, under their authority;" and if the case so arises, no matter if it be first decided by a court of a State, or by a judge or justice of a State, or by a judge or justice of the peace of the United States, or by the accounting officers of the treasury who hold their officers during pleasure, yet it is within the lawful authority of the Congress of the United States to draw the case to the examination of the courts of the United States, and to the final decision of the Supreme Court, under such regulations as the Congress shall make. So it must necessarily be in order to maintain the uniform construction and administration of the Constitution, laws, and treaties of the United States and their supremacy.

Accordingly, by the 25th section of the judiciary act of 1789, (i Statutes at Large, by Little & B., p. 85, chap. 20,) a final judgment or decree in the highest court of a State in which a decision can be had by the laws of the State, "may be re-examined and reversed or affirmed," in the Supreme Court of the United States, if such decision involves a question within the judicial power of the United States, as particularly defined in that act. Under that 26th section many decisions of the State tribunals have been reviewed and reversed in the Supreme Court; whereof, it will suffice to cite: Martin *vs.* Hunter's lessee, i Wheat., 323; Cohens *vs.* The State of Virginia; vi Wheaton, 375; Buel *vs.* Van Ness, viii Wheat., 322; Weston *vs.* The City Council of Charleston, ii Peters, 463; Buchanan *vs.* Alexander, iv Howard, 20. The case of Cohens was a writ of error to the judgment of the hustings court for the borough of Norfolk, in the State of Virginia, upon a presentment for vending lottery tickets in a lottery authorized by a law of the United States, the sale of such being supposed to have been prohibited by the law of the State of Virginia, and the court in which the judgment was rendered being the highest court which had jurisdiction of the case. In Van Ness & Buel, it was determined that the value in controversy was immaterial where the right under a law of the United States was involved. In Weston *vs.* The City Council of Charleston the decision re-examined and reversed was upon a writ of prohibition. The case of Buchanan *vs.* Alexander arose out of attachments issued by a justice of the peace against seamen, and garnisheeing moneys in the hands of the purser due to the sailors for wages; the attachments were severally affirmed in the superior court for Norfolk, in Virginia, being the ultimate tribunal of the State which could take cognizance of the attachments.

The 29th section of the judiciary act of 1789 provides for the removal of cases, commenced in the courts of States, into the federal courts, in certain cases coming within the judicial powers delegated to the United States. And in the case of Gordon *vs.* Longest, xvi Peters, 101, the State court having improperly refused to remove the case to the circuit court of the United States for that district, upon the petition of Gordon, the judgment of the State court was for that refusal reversed in the Supreme Court of the United States.

The laws of the United States authorize appeals and writs of error from the decisions of the supreme courts of the respective territories of the United States, as will be seen in the act of 3d March, 1805, (ii Stat. at Large, by Little & B., p. 338, chap. 38;) and in other subsequent statutes organizing territorial governments.

By the act to establish a territorial government for Utah, for example, approved 9th September, 1850, (ix Stat. at Large, by L. & B., pages 455–456, chap. 51, sec. 9,) the judicial power is vested in a supreme court, district courts, probate courts, and justices of the peace, with writs of error and appeals from the decisions of the supreme territorial court to the Supreme Court of the United States, in cases where the value in controversy shall exceed one thousand dollars. It moreover allows writs of error and appeals to the Supreme Court of the United States "from the decisions of said supreme (territorial) court created by this act, or of any *judge* thereof, or of the *district courts* created by this act, or of any *judge thereof*, upon any writ of *habeas corpus* involving the question of personal freedom."

The decision of the accounting officers of the Treasury of the United States, in disallowing credits claimed, may be reviewed and reversed in the courts of justice, according to the fourth section of the act of 3d March, 1797. (i, Stat. at Large, by L. & B., p. 515, chap. 20.)

By the act of 15 May, 1820—"providing for the better organization of the Treasury Department," (iii Stat. at Large, by L. & B., p. 592, chap. 107,) warrants of distress issued under that act, against debtors to the United States, by the comptroller of the Treasury, are liable to be injoined by bill in equity presented to the district judge, according to sections four, five and six of that act. (See United States *vs.* Nourse, ix Peters, 8.)

The ministerial acts of the executive officers of the United States are, to a certain extent, subject to be examined and reviewed by the courts of the United States; as in *ex parte* Randolph, ii Brockenborough's Rep. 470–'77; same case, in note to United States *vs.* Nourse, ix Peters', 12–17; Postmaster General U. S., *vs.* Stokes, xii Peter', 254, 526, 614, 618; act of 1789—"to establish the judicial courts of the United States,"—i Stat. at Large, by L. & B., p. 81, chap. 20, sec. 13.

The scope of the judicial powers of the United States, under the Constitution, would authorize Congress to confer upon the judicial tribunals the like powers of issuing writs of mandamus, as those exercised by the court of King's Bench in England, directed to any officer of the Government of the United States, or inferior court of the United States, requiring them to do that which is just and lawful, and appertaining to their office and public duty, in cases where there is no other adequate remedy. Congress have not, as yet, thought it fit and expedient to vest in courts the whole of the judicial powers which the Constitution permits: a portion as yet remains dormant. (Postmaster General Kendal *vs.* Stokes, relator, xii Peters', 518, 627, 641, 642.) But, in so far as Congress have acted upon the subject, in the various cases before mentioned, including the appeals to the district court from the court of commissioners, as regulated by the acts of 1851–'52, they are well authorized by the powers delegated by the Constitution of the United States.

IV. It is alleged in the printed Brief for appellant, (p. 5,) "that the proceedings in the court below were in derogation of the rights of Cervantes—of rights growing out of the act of 1851, and his acceptance of its provisions. The act of 1851, was, it is argued, a proposal of one land claimant to a counter claimant, to settle the controversy in a manner and on the terms therein set forth. Cervantes assented to those terms, by filing and prosecuting his claim before the commission, and thereby the act of 1851 became a *contract* between the United States and Cervantes, which of course neither party would alter without the consent of the other. This objection was also made in similar terms and specifications, to be seen in the printed Record, p. 100, objections 6th and 7th.

The sum of this argument for the appellant is, that Cervantes, by having instituted his suit while the act of 1851 was in force, thereby acquired such a private right and vested interest in the provisions of the ninth, tenth, and twelfth sections of that statute, as to the mode and form of prosecuting an appeal, and as to the limitation of time within which an appeal should be prosecuted when a final decision should be made, as that Congress could not, constitutionally and rightfully, pass the twelfth sect. of the act of 1852, to operate upon his case.

The reply to this argumentis obvious and complete. Whatever right to the land Cervantes may have acquired under the government of Mexico, whether legal or equitable, that right to the land, under the Governmentof the United States, is not intended to be impaired, cannot be impaired, it is secured by the treaty of Guadalupe Hidalgo, by the law of nations, by the principles of law of universal obligation, which even a conqueror dare not disrespect, cannot infringe, but at the hazard of the contempt of neighboring nations and of the revolt of his subjects or citizens.

Congress has especially secured the rights to lands by requiring all the tribunals of original and of appellate jurisdiction "in deciding on the validity of any claim brought before them under the provisions of this act to be governed by the treaty of Guadalupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable."

What greater security has any citizen of the United States for his rights of private property?

The distinction between the right and the remedy exists in the nature of things. Without impairing the right, the remedy may certainly be modified as the wisdom of the nation shall direct. Statutes of limitation relate to the remedies which are furnished in the courts. (Sturges *vs.* Crowningshield, iv Wheaton 200, and 207. Bank United States *vs.* Donally, viii Peters, 372. Huberus. vol. 2, book I, title 3, § 7. Story's Confl. laws, § 557, 5676, chap. 14, page 931, 957.)

The 11th sect. of the act of 1851 relates to the right, *ad litis decisionem*, and remains unchanged. Sect. 9, 10, 12, relate solely to the remedy, *ad litis ordinationem*.

The administration of justice by a nation is a part of its public right and duty.

The different modes of proceeding, the different kinds of remedies, the different forums, and the times within which remedies shall be pursued, are subjects belonging to the discretion of every nation, with the right and the duty to adopt those best suited to the administration of justice, best adapted to enforce rights and suppress wrongs. To modify, amend, or change the modes of proceeding, the forums, and remedies, from time to time, as convenience, experience, and enlightened policy shall dictate, is likewise a public right and duty.

"The duration of law in general, as well as its first establishment, depends on the free will and pleasure of the sovereign, who can cannot reasonably tie up his own hands in this respect. * * * "It would be absurd and pernicious to society, to pretend that laws once created, ought to subsist forever, let what inconveniency soever arise. (Burlamaqui on Natural and Political Law, book I, chap. 10, sect. 14, p. 76.)

To deny the right to modify remedies from time to time, as experience and exigencies shall require, is to deny the right to improve and perfect. It defeats the purpose of the social compact.

The remedy, the forms, and modes of proceeding in courts, the manner of certifying an appeal from one forum to another for review, and the times within which a review may be had, are subjects of legislative discretion, matters of public policy.

Rights are determined by the laws of the country existing at the time of each particular business transacted in that country. The changes of the laws, the changes of forum, the changes of the modes of proceeding in the forum, the changes of sovereignty, do not change the rights of the parties in the particular transaction.

But it is an egregious error to say that each particular transaction, under which a right is claimed, carries along with it the particular modes of proceeding, the particular forms of remedies, the particular forms existing at the time of the transaction; that each particular transaction, or each particular suit instituted, binds and ties up the hands of the legislature, so that they cannot modify, from time to time, the forms and modes of proceedings, to ascertain and enforce that right, or to guard against a wrong; that when antient transactions are brought on for judicial investigation, the antiquated, inconvenient, cumbrous, obsolete, and abrogated forms and modes of proceeding are to be revived, observed, and applied.

The principle asserted by the motion to dismiss this appeal from the decision of the court of commissioners to the district court, because it has been prosecuted according to the law of 1852, made before, and existing when the decree of the commissioners was finally pronounced, and not according to the law of 1851, existing when the petition was presented to the commissioners, would, if admitted, in its effects and consequences, run into the greatest inconveniences and absurdities. It is the shade of a gross error, long since tried and condemned at the bar of reason, experience, and wisdom, and buried in oblivion.

If that postulate had been suffered to prevail as true doctrine, it would have been a stumbling block in the way of abolishing at once those absurd trials by fire ordeal, by water ordeal, by battle, and the various other superstitious modes of trial which once prevailed in England, and in other countries, and would have hindered and encumbered the rise, progress, and improvement of the laws of England, during the five periods mentioned by her legal historians from the earliest times, down to the present age. (iv Black. Comm., chap. 33, pp. 407, 418, 425, 441, &c.)

The postulate, upon which the dismissal of the appeal is demanded, would, in its effects and consequences, carry the trial of the right to this land to such forum, such remedies, such modes of proceeding as prevailed in Upper California, and the Supreme Government of Mexico, where the claim of Cruz Cervantes originated, and prevent its consideration by any other.

The idea that because a plaintiff has begun his suit in a particular court, on a particular day, he thereby acquires such a private vested right to the continuation of that particular court, and to a continuation of all the public laws regulating that court, and its modes of proceeding, and, also, in all the public laws relating to the appeal from the decision of that court, with the mode and formula of carrying the appeal from a decision, thereinafter to be made, to a superior court, so that the hands of the legislature are bound up against abolishing that court, and transferring the cognizance of the case to another judicial tribunal, and from altering the manner of taking an appeal when the decision shall be given, unless the personal and individual consent of the plaintiff be given, is a heresy, opposed by the practice of all governments, legislators, judges, and executive officers, and contrary to the very nature and foundation of the Government. The statute books abound with the creation of new judicial tribunals, and express transfers by law of suits and prosecutions pending in the old to the new, there to be heard and determined.

Congress have found it necessary and proper to make new judicial districts, and new courts, in the States of New York, Pennsylvania, Virginia, North Carolina, and Louisiana; to alter the judicial system first established in Kentucky, Ohio, Tennessee, and in various other States, which, from being territories, and under territorial governments, have been admitted into the Union as States, wherein a district court, with powers of a circuit court, was first established, and thereafter the circuit court system extended to them. In all which changes, provisions were made, either for retaining suits pending in the old jurisdiction, or for transferring them to the new, as deemed most convenient and politic.

Every day, controversies, originated in the several States, under the laws thereof, and in foreign countries, under foreign laws, are litigated, heard, and determined in the federal courts, and the remedies administered therein according to the forms and modes of proceeding established by the laws of the United States. The decisions of the rights involved are according to the laws of the State, or nation, wherein the transaction was done; the remedies are administered according to the law of the forum. The judicial power of the United States, as defined by the Constitution, is founded upon the distinction between the right and the remedy.

The counsel for Cruz Cervantes alleges that said Cervantes "has not consented, and now protests against" the act of Congress of 1852, "and does not consent to a variance of or departure from" the act of 1851. (Printed Record, pages 100, 101.)

Is it not against all sense to assume, that the members of the Senate and of the House of Representatives of the United States, and the constituents of them, who voted in the negative, and recorded their names on the journals against the passage of a law, or otherwise opposed it in opinion, were therefore not bound by the law when duly enacted by the competent number, and approved by the President of the United States?

By the fundamental principles of government, by the theory of the social compact, by the fact of forming or living under a constitutional form of government, every member of the society is considered as consenting, in advance, to be bound by and to submit to all laws, and every one of them, which shall be made in pursuance of the Constitution.

The Constitution of the United States provides for the making of laws by the passage of bills by the House of Representatives and the Senate and the assent of the President of the United States, or if he disapprove, then by the passage by yeas and nays entered on the journal of each House, respectively, by the votes of two-thirds of each House. And thereafter ordains, "that this Constitution and the laws made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."

Every man in the United States is, in judgment of law, party to the making of a law of the United States and bound thereby, being present by his representatives, the members of the two Houses of Congress, and the President of the United States, who is himself elected by, and represents, all the people of the several States.

What sort of government would that be, which should allow each individual as to whom a law, enacted by the competent authority, was about to be enforced, to protest against the law and thereby require direct proof that he had given to it his personal and individual assent?

V. It is objected by the appellant, (printed Brief, p. 7,) "that the judgment of the court below is erroneous, apart from the merits of the claim of Cervantes.

1st. because it is not rendered on the pleadings and evidence in the case; and the court had no authority to render a judgment, except on the pleadings and evidence.

How far the decree of the district court conforms to or departs from the pleadings and evidence, this appellate court will decide: that is not a question of jurisdiction.

"2. It was rendered at a special term, for the holding of which it had no authority; and a time when it had not authority to hold any term; and when the appellee cannot be supposed to have even constructive notice."

The third section of the act of 28th September, 1850, extending the laws and the judicial system of the United States to the State of California, which constituted the northern and southern districts, enacts, "that the judges of the districts of California shall hold extra sessions at any time when the public interest may in their opinion require the same."

As to the supposition that the appellee Cervantes, had not "even constructive notice" of that extra term, this is openly contradicted by the Record, which shows, p. 99, 101, and 102, that the counsel for Cervantes made three several motions to dismiss the appeal and argued their said motions, on the 17th day of October, and again on the 21st October, 1853, at the said extra term.

3. It is objected that the decree of the court "was founded on a transcript which was not lawfully before it, and of which it could not take judicial notice."

This seems to be but a repetition of one of the objections specified under the second head, as to the authentication of the transcript of the record by the secretary of the board of commissioners, and has been answered.

4. It is objected that the decree of the court does not recite "the facts necessary to show its jurisdiction, and authorize it to pronounce judgment."

The decree is founded on the record, which shows the facts necessary to sustain the jurisdiction of the court, including the notice by the Attorney General of the intention to prosecute the appeal, (printed Record, p. 98.)

The district court of the United States for the northern district of California, although an inferior court of the United States, in the language of the Constitution, (because it is inferior to the Supreme Court of the United States,) "is not so in the language of the common law, nor are its proceedings subject to the scrutiny of those narrow rules which the caution or jealousy of the courts at Westminster long applied to courts of that denomination, but are entitled to as liberal intendments or presumptions, in favor of their regularity, as those of the Supreme Court." * * * * A district court of the United States, however, "is of limited jurisdiction, and has cognizance not of cases generally, but only of a few specially circumstanced." * * "This renders it necessary, inasmuch as the proceedings of no court can be deemed valid further than its jurisdiction appears or can be presumed, to set forth, upon the record of a district court or circuit court of the United States, the facts or circumstances which give jurisdiction either expressly or in such manner as to render them certain, by legal intendment." (Turner, administrator of Stanley *vs.* The Bank of North America, iv Dallas, 11.)

But if the rule was, that the facts and circumstances to sustain the jurisdiction should appear in the judgment or decree of the court, as the appellant supposes, instead of upon the whole record, yet the decree itself, in this case of Cervantes, does recite the facts necessary to show the jurisdiction of the court. The final decree (printed Record, p. 100) is in these words and figures: "This cause coming to be heard at the above stated term, on appeal from the final decision of the commissioners to ascertain and settle private land claims in the State of California, under the act of Congress approved March 3, 1851, upon the transcript of the proceedings and decision, and the papers and evidence on which said decision was founded; and it appearing to the court that said transcript has been duly and regularly filed in pursuance of the 12th section of the act of Congress approved August 31, 1851; and the argument of counsel for the United States and for claimplainant being heard: It is ordered, adjudged, and decreed," &c.

The notice of the appeal by the Attorney General is in the Record at page 98.

VI. Under this head certain assumed general principles are announced in behalf of Cervantes, (printed Brief, pp. 7, 8.)

As to these alleged general principles, the United States deny them either as premises or in their application, or suggest modification of the doctrine they assert or imply, as follows:

1. It is said for Cervantes that the United States, in respect of proprietary rights, are to be considered in their private capacity, and in that capacity can have no rights other than those of an individual; and

4. That the United States hold the public domain in their private and not in any political or sovereign capacity.

This imputed private capacity is a metaphysical fiction or metaphor, not a constitutional fact.

The United States hold the public domain as a government and no otherwise, being in that respect the trustee of the States and their people, as in the power to make laws, regulate commerce, or perform any other act of sovereignty.

5. Printed Brief, p. 8.—It is said, for Cervantes, "that the only advantage which the United States had over any individual who might have purchased the residuary interest of Mexico in California, was in their immunity from judicial process, and that they relinquished that advantage in respect of the claim of Cervantes by the act of 1851, and his acceptance of its provisions."

To this it is answered, 1st, that the United States, by their treaty with Mexico, in which California was ceded to them, acquired the sovereignty and jurisdiction, as well as the public domain; whereas an individual, who might have purchased from Mexico her residuary interest in the lands in California not granted to others, would have acquired only the title to the lands, without the political powers of government; 2d. By the act of 1851 the United States did not relinquish their political sovereignty and jurisdiction, nor tie their hands against future legislation; did the institution of the suit by Cervantes, under that act, pretended by Cervantes to be "his acceptance of its provisions," have the effect of taking away the legislative power of the United States, as that argument supposes.

The Congress of the United States legislates in regard to this subject, as in regard to all others, as the representation, *quoad hoc*, of the sovereignty of the States united.

2. The second point under this head consists of a series of propositions in substance as follows:

1. "The same acts constitute a contract on the part of a State as would constitute a contract on the part of an individual," and "a State cannot violate its contract any more than an individual can violate his."

Those two associated propositions, in the form and to the precise extent in which they appear, must be qualified, by consideration of the eminent domain, and especially in their application to the Federal Government, the powers of which are such, and such only, as the Constitution confers.

Contracts, strictly so called, when made by the United States, are undoubtedly subject, when they come before the courts, to the same general rules of construction as contracts by individuals. (See United States *vs.* Kirkpatrick, ix Wheat., 729; Farrar *vs.* United States, v Peters, 573; Smith *vs.* United States, v Peters, 294; United States *vs.* Tingy, v Peters, 118; United States *vs.* Buford, iii Peters, 12, 30.

As to the implied or constructive contracts involved in the tenor of an act of legislation, the Constitution distinguishes, and for good reason of course, between laws enacted by a State of the Union and laws enacted by the Congress of the United States. (Evans *vs.* Eaton, Peters C. C. R, 322, 337.)

But there is nothing in the present case which seems to call for a discussion of the vext question of legislative contracts, whether applied to the land laws of the Mexican Republic, or to those of the United States.

2. "A state cannot legislate itself into rights."

This proposition, to be admitted, must be qualified, and its application to the case is denied.

3. A state, "when impleaded in a judicial controversy, can only be considered in its private capacity, with the same rights as the opposing party."

A judicial controversy, to which the state is a party, may be subject to the same general rules of law as if both parties were individual citizens; but the ascription of a "private capacity" to the state is not the less to be questioned.

3. The third point, under this head, also consists of a series of propositions, in substance as follows:

1. The judiciary, "though established by the political power, is in its proceedings independent."

The judiciary department, in the United States, is the creature of the Constitution, like the legislative and executive departments.

In some respects each is independent of the other, and in others not. The political power, in the United States, decides for itself absolutely all those things which the Constitution empowers it so to decide; and so, only, does the judiciary power.

2. The judiciary "is not, in any sense, a part of the state, when it comes to judge between the state and an individual."

This proposition cannot be admitted as true either in fact or law.

3. "The state in fact," it is added, "not appearing before the judiciary in its political, but in its private capacity."

The state appears in fact as what it is in fact, that is, as the state.

Finally, as to all the arguments suggested or shadowed out under this head, it may be observed that they imply that the case of Cervantes cannot be maintained by "the provisions of the treaty of Gaudalupe Hidalgo; the law of nations; the laws, usages, and customs of the government from which the claim is derived; the principles of equity; and the decisions of the Supreme Court of the United States, so far as they are applicable." The act of Congress for the adjudication of land claims in California, expressly enacts "that the commissioners herein provided for, and the District and Supreme Courts, in deciding on the validity of any claim brought before them under the provisions of this act, shall be governed" by these rules. They give to Cervantes, as to all the other claimants, unquestionably the security of every doctrine of positive law recognised in the jurisprudence of the United States. In seeking to go beyond this, and in placing at the foundation of his case questionable abstract propositions of government, he in effect raises doubts as to the merits of his case, legal or equitable, upon the Record.

It remains to discuss the merits in the second part of this Brief.

C. CUSHING,
Attorney General.

DOCUMENTS,

DEPOSITIONS AND BRIEF

OF

LAW POINTS RAISED THEREON ON BEHALF

OF

The United States, in Case Number 280,

BEFORE THE

U. S. BOARD OF LAND COMMISSIONERS.

THE CITY OF SAN FRANCISCO
VS.
THE UNITED STATES.

SAN FRANCISCO:
COMMERCIAL POWER PRESSES, SACRAMENTO STREET.
1854.

taken and read as a part of this petition. The same act was modified and changed by an act of the same Legislature, passed A. D., which is also asked to be taken and read as a part of this petition.

On the 7th of July, A. D., 1846, the then pueblo, now city of San Francisco, was a town of the population of about one thousand inhabitants, and on the 3d of March, A. D., 1851, the population thereof amounted to about thirty thousand persons, and that on the said 7th of July, and on said third of March, the said pueblo or city, under and by virtue of the grant aforesaid, and under and by virtue of the laws, usages, and customs of the government of Mexico and California, all and singular the premises aforesaid, except as aforesaid, were part and parcel of the land and premises of said pueblo or city.

There are several adverse claims to the one herein set forth.

One Jose de Jesus who claims one square league, part of said premises, as particularly appears by his petition therefor now before your Board, numbered thirty on the docket of claims. That Jacob Luis Leese and Salvador Vallejo claim two hundred varas square, part of said premises, which claim is particularly exhibited in the petition therefor before your Board, numbered 74 on the docket of claims. That James R. Bolton claims three square leagues (with exceptions) part of said premises, which claim particularly appears in his petition before your Board, and numbered 81 according to the docket of claims. That Josefa de Haro and others, the "Potrero of San Francisco" being one half square league, part of said premises, the particulars whereof appear in third claim before your Board, number 101 on the docket of claims.

That John F. Shultess, and others, claim thirty-seven vara lots, part of said premises, particularly described in his petition, on file with your Board, and numbered 171 according to docket of claims. That the said John F. Shultess also claims forty-seven other fifty vara lots, part of said premises, particularly described in his petition before your Board, and numbered 172 of claims.

That Josefa de Haro and and others, claim premises known as the "Laguna de la Merced," one league long and one half league wide, and particularly described in their petition before your Board, numbered 102 of claims, and which is also part of premises herein first described.

That one Thomas O. Larkin claims a tract of land, parcel of said premises, and including a portion of the incorporated limits of the city of San Francisco to the west, and running thence westerly along the waters of the bay to the Pacific Ocean, including the site of the Presidio, the quantity or particular description of his claim this claimant is unable to state. That Charles V. Stuart and Isaac N. Thorne claim a portion of said premises, known as Ridley's ranch, under a grant to Jacob P. Leese of one league and one half, situated contiguous to and north of the Sanchez ranch, but a particular description thereof cannot be given by claimant.

The claimant represents to your honorable Board that all and singular the foregoing adverse claims are insufficient and void. That all of them were made subsequent to the establishment of the pueblo of San Francisco, and that the grants thereof were in the derogation of the lawful claim and right of the said pueblo. That some of them were made after the authority of the government of Mexico in the Department of California had been superceded by the authority of the government of the United States, that such is the fact particularly in the case of the lands claimed by James R. Bolton as aforesaid, and in the case of the lands claimed by Thomas O. Larkin as aforesaid, also in the case of the lands claimed as aforesaid by John F. Shultess and others, and by John F. Shultess. That all said claims are based upon grants made without authority of law, and in direct violation of the laws and regulations of the government of Mexico in force in Califoraia.

The said city of San Francisco now insists that by the Treaty of Guadalupe Hidalgo, the laws of nations, and the laws, usages and customs of the government of Mexico, in force in California, as also by force of the act of the Legislature of said State incorporating the said city, and the act of Congress of the United States, entitled "an act to settle the private land claims in the State of California," approved March 3, 1851, the said city has good and lawful claim to all and singular the premises aforesaid, and said city relies upon the said laws, usages and customs, and proceedings in pursuance thereof, upon the order made for the establishment of the pueblo of San Francisco the record of other evidences of its existence, continuance and extent the grant to said pueblo as aforesaid, and upon such other evidence as may be adduced, touching the premises, upon a full exhibition and consideration of all which premises it is prayed that such claim be confirmed.

J. A. McDOUGALL,
For the city of San Francisco.

San Francisco, Feb. 11th, 1853.

On this day, before Commissioner Harry I. Thornton, came M. G Vallejo, a witness in behalf of the claimant, city of San Francisco, petition No. 280, and was duly sworn, his evidence being given in English.

QUESTIONS BY CLAIMANT'S COUNSEL.

Question 1.—What is your name and age, and place of residence.

Answer.—My name is Mariano G. Vallejo, my age is 45, I reside in Sonoma, and have lived in California all my life.

Ques. 2.—What office did you hold in 1834, 1835, and 1836.

Ans.—I was at that time commandante of San Francisco, and of the northern frontier of California.

Ques. 3.—Examine the document now here shown to you, filed herewith, and marked Exhibit No. 1, and say whether you are acquainted with the hand writing of Governor Figueroa signed thereto, and if yea, whether his signature thereto is genuine or not, and state further what you know in regard to that document

Ans.—I have examined the said Exhibit, and am well acquainted with the hand writing of Figueroa signed thereto, having often seen him write, and have no doubt that his signature thereto is genuine. This document was transmitted regularly to me, and recorded officially with others for my instruction and guide in the discharge of my duties.

Ques. 4.—Examine the document marked Exhibit No. 2, and filed herewith, and say whether you are acquainted with the hand writing of Francisco de Haro, Francisco Sanchez, Joachim Castro and Juan Mirando, whose names are attached to said document, and if yea, state whether their signatures in and upon said document are their genuine signatures.

Ans.—I have examined the said Exhibit No. 2, filed herewith; am acquainted with the hand-writing of the persons named in the interrogatory and whose signatures are made on said document having often seen them write, and say their signatures, where they occur thereon are genuine.

Ques. 5.—Do you or not know whether the election of officers, as stated in this last above named document took place?

Ans.—The election of officers as stated in said document, did take place.

Ques. 6.—Examine the document now shown to you, marked Exhibit 3, and filed herewith, and say if you are acquainted with the hand-writing of Francisco de Haro and Francisco Sanchez, signed to said document, and if you can state whether their signatures thereto are genuine?

Ans.—I have examined the document marked Exhibit No. 3 herewith filed, am acquainted with the hand-writing of the persons whose names are signed thereto, having often seen them write, and their signatures thereto are genuine.

Ques. 7.—State if you know whether or not the election of officers referred to in this last named document took place as stated?

Ans.—I know that said election did take place as stated.

Ques. 8.—State whether or not a municipal organization of the pueblo of San Francisco was continued to the time of the occupation of the country by the United States from the period of the elections above named.

Ans.—There was a municipal organization of the said pueblo o San Francisco during the whole period above indicated.

Ques. 9.—In the papers received by you from Governor Figueroa in 1834 was there any one designating the boundaries of the Pueblo of San Francisco.

Ans.—There was a paper received by me from the Governor for that purpose.

Ques. 10—Examine the document now here shown to you marked Exhibit No. 4 to this deposition, and say whether to the best of your knowledge and belief it is a true copy of the original received by you as stated in your last answer written above.

Ans.—I have examined the said paper marked Exhibit No. 4 to this deposition and according to my best recollection it is a copy of the document received by me as above stated.

Ques. 11—State if you know where the original of the document No. 4 above referred to now is?

Ans.—I do not know where it now is if it be in existence; I put it among the Archives in the Pueblo, as I did other documents of that character.

Ques. 12.—Did you or not ever receive or have in your possession a copy of the original referred to as Exhibit No. 4, certified by Augustus V. Zamarano, the Secretary of the Government under Governor Figueroa?

Ans.—I did have in my possession a copy of the said original document referred to in my last answer certified by the said Secretary Zamarano as Secretary of the Government under Figueroa.

Ques. 13.—Do you or not know what has become of that copy so furnished to you?

Ans.—I think I have that copy among my private papers.

Ques. 14.—Have or not your private papers, among which this certified copy should be, been in the hands of Raymond De Saldo at any time within the last three months?

Ans.—I believe they have been in his possession within that time.

Ques. 15.—Has or not the said De Saldo a portion of your private papers now in his possession?

Ans.—I think he has not. I think he returned all my papers.

Ques. 16.—Did you or not mark out the boundaries of the Pueblo of San Francisco according to the boundaries described in document Exhibit No. 4 to this deposition?

Ans.—I did, before the time of receiving said document, proceed to mark out the boundaries, and sent down to Monterey an Expediente thereof, and they were established by me within two weeks after the date of the said dispatch Exhibit No. 4.

Ques. 17.—Do you remember any who were present with you at the marking out and establishing these pueblo boundaries, and if, name them?

Ans.—There were present those I now remember: Francisco de Haro, Jose Sanchez, Francisco Cazeres and Juan Miranda. There are many others whose names I do not recollect, and those that I do remember are not all dead.

Ques. 18.—Have you or not such a recollection of the boundaries established by you, as that you could now describe them and point them out.

Ans.—I have such recollection that I could point them out on the ground and all the boundaries made, in fact, are on reflection, not named in the copy exhibit 4, to this deposition.

QUESTIONS BY UNITED STATES LAW AGENT.

Ques. 1.—What extent of territory was comprehended in the pertido of San Francisco under the jurisdiction of the Ayuntiemento.

Ans.—The partido comprehended the country on this side of the bay as far as Los Pulgas, and on the other side of the bay the Rancho of the Paraltas and Panoli; the jurisdiction of the Ayuntamiento extended only to the limits of the pueblo. The partido was under the jurisdiction of civil Alcaldes.

Ques. 2.—Did the inhabitants of all this territory take part in the election of the whole Ayuntamiento of San Francisco?

Ans.—The greater part of the inhabitants of the partido lived in San Francisco and voted there.

Ques. 3.—Did any of the persons who voted as electors for the Ayuntamiento of San Francisco, live out of the limits of the pueblo?

Ans.—All lived in San Francisco except Joaquin Castro, and I don't know whether he did or not.

Ques. 4.—Did the Ayuntamiento of San Francisco exercise jurisdiction over all the potrero?

Ans.—No sir I did not.

Ques. 5.—How long did the Ayuntamiento of San Francisco subsist?

Ans.—I do not recollect.

M. G. VALLEJO.

U. S. Law Agent, present. Sworn to and subscribed before me this 11th of February, 1853. HARRY J. THORNTON, Commissioner.

Examination continued of the same witness by the claimant.

Ques.—Examine the papers now shown to you and marked Nos. 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and filed herewith as Exhibits and say if the signatures of Jose Figueroa, Jose Castro, Nicholas Gutterrez, Francisco de Haro, Francisco Guerraro Palamares, Francisco Sanchez, Antonio Maria Peralta, J. de L. Cruz, Manuel Jemino, Jesus Noe, Juan N. Padilla, Juan Baulim and Robert T. Ridley are genuine or not?

Ans.—I have examined the papers which are marked as above in interrogatory and to be attached hereto; I am acquainted with their hand-writing, having seen them write, and say that their signatures respectively, where they appear in and upon said marked papers, are their genuine signatures.

Ques. 2.—Was there, or not, a town on the present site of the city of San Francisco, on the 7th day of July, 1846, and on the 3d day of March, 1851.

Ans.—There was a town on the present site of San Francisco, on the 7th of July, 1846, and there was on the 3d of March, 1851, a town on the site called San Francisco.

Ques.—Have you, or not, in your possession now, the paper referred to in your deposition, above taken mentioned in your answer to question 12.

Ans.—I have the paper now in my possession, which was referred to in my deposition as above mentioned, which is now here by me produced to be attached to this deposition, and marked exhibit No. 18.

Ques.—Is, or not, the signature of Zamorano, if you know it, his true and genuine signature to the said exhibit No. 18.

Ans.—I am acquainted with the handwriting of the said Zamorano, having seen him write, and say that his signature in exhibit No. 18, is his genuine signature.

Ques.—Has, or not, this document referred to, exhibit 18, been in your possession ever since about the period of its date.

Ans.—I was in possession of it, except at the Bear Revolution, as it is called, in 1846; it, with my other papers, was taken from me, and retained until after my own release; I think my papers were not returned to me until early in the year 1847, by Lieut. Revere of the U. S. Navy.

Ques.—Is, or not, the paper now produced by you, and marked as above, exhibit No. 18, to the best of your knowledge and belief, a true copy of the original received by you from Gov. Figueroa, and delivered over by you to the Alcalde of the pueblo De Haro.

Ans.—I have no hesitancy in saying that it is.

Ques.—Does or not this paper Exhibit No. 18, contain a true statement of the boundaries of the Pueblo, as marked out by you?

Ans.—It does contain the boundaries as they were established by me.

CROSS EXAMINATION BY THE UNITED STATES LAW AGENT.

Ques.—When the Ayuntamiento was elected from the pueblo of San Francisco, were any other Alcaldes elected for the portions of the partido of San Francisco, out of the limits of the pueblo?

Ans.—I do not recollect.

Signed M. G. VALLEJO.

U. S. Law Agent present.

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Sworn to and subscribed before me, this 15th day of February, 1853.
Signed H. I. THORNTON, Commissioner.
Filed in office Feb'y 11th, 1853. GEORGE FISHER, Sec'y.

Exhibit No. 1, *annexed to the Deposition of M. G. Vallejo.*

Gov. Figueroa, by an official note bearing date Nov. 4, 1834, makes known to Gen. Vallejo that the Territorial Deputation in use of the faculties conferred on them by the law of 23d June, 1813, had on the day before resolved that the *Partido* of San Francisco might proceed to elect a Constitutional Ayuntamiento which should reside in the Presidio of that name, composed of one Alcalde, two Regidors, and one Sindico Procurador, regulating itself in doing so by the Constitution in force and by the law of 12th of June (it should be 12th of July) 1830, and that report should be made of this resolution to the Supreme Government. That the Ayuntamiento being installed should exercise the political functions with which the Commandant had been charged, and that the Alcalde should exercise the judicial functions in defect of a *Judge of Letters.*

Exhibits No. 2 *and* 3 *annexed to the Deposition of M. G. Vallejo.*

That on the 7th December, 1834 and 13th December, 1835, primary elections were had for electors, who were to elect the municipal officers; the first being held in the Presidio of San Francisco, and the second in the plaza of the "Pueblo of *San Francisco* de Asis," but whether the election of Ayuntamiento took place, does not appear from any document on file.

Exhibit No. 5, *annexed to the Deposition of M. G. Vallejo.*

It appears that in the year 1835 the Constitutional Alcalde of "San Francisco de Asis," appointed an Assistant Alcalde for Contra Costa, which was approved by the Governor.

Exhibit No. 6, *annexed to the Deposition of M. G. Vallejo.*

That the Territorial Deputation, by a resolution of 22d Sept., 1835, authorized the Ayuntamiento of "San Francisco de Asis" to grant lots on which to build houses at the place called Yerba Buena, which lots were not to exceed 100 varas square, and to be distant from the beach 200 varas, for which grants the *canon*, or tax, was to be paid to the Ayuntamento for the benefit of the municipal fund (propias) which might be prescribed, (by the government of course,) and the Ayuntamiento in the execution of this authorization were to have respect to regular[illegible]n.

[illegible] which is communicated by Jose Casto, Gefe Politico, to the "Alcalde of San Francisco de Asis," in a note dated 26th Oct., 1835, in order, as he says, that it may be made known to the residents of that *Pueblo*, so that they may not thereafter make their application to the government the granting thus authorized, being one of the favors which the Ayuntamiento can dispense.

Exhibit No. 7, *annexed to the Deputation of M. G. Vallejo.*

By an official note of 19th Jan. 1836, addressed by the Gefe Politico Gutieriz to the Alcalde of "San Francisco de Asis," this functionary is reminded of the necessity of a punctual compliance with the law of 22d July, 1833, requiring a monthly report of criminal causes.

Exhibit No. 8, *annexed to the Deposition of M. G. Vallejo.*

It appears that on the 3d December, 1837, in the "Pueblo of San Francisco de Asis" electors were chosen who, on the 8th Jan., 1838, (Exhibit No. 9, annexed to the Deposition of M. G. Vallejo,) elected an Alcalde, 2d Regidor and Procurador Sindico for the year 1838.

Exhibit No. 10, *annexed to the Deposition of M. G. Vallego.*

By this it appears that Governor Alvarado in a *Bando* dated 17th Jan. 1839, premising that owing to circumstances, the elections under the constitutional system (of 1837) had not yet taken place, and that he was desirous that the authorities which were authorized by it should be established, ordained that the constitutional elections should take place according to the law of 30 November, 1836, beginning on the first *Sunday* of March then next following and ending on the third *Sunday* of the same month; that one elector should be chosen for San Francisco, San Jose, *Villa* of Branciforte, Monterey, Santa Barbara, Los Angeles and San Diego; that for the purpose of carrying these elections into effect certain places named should be considered as *cabezeras* and among them the port of San Francisco was to be considered as the *cabezerás* of the whole frontier north of it, that is the elections were to be held there. This *Bando* appears to have been communicated by "Haro," to the Assistant Alcalde in Contra Costa.

Exhibit No. 11, *annexed to the Deposition of M. G. Vallejo.*

Don Manuel Micheltorrena by document dated Nov. 4, 1843, bearing the signature of himself and Manuel Jimeno, recites that although Justices of the Peace have been established in the pueblo of this department conformably to the law of March 20, 1837, the which confers upon them the same powers and obligations as those belonging to the Ayuntamientos yet it has been observed that in the capitals of districts subjects of various classes are daily occurring which prevent them from attending to the duties which devolve upon them in defect of an Ayuntamiento; the Prefectures having also to cease for the coming year and as a resolution on the subject has been taken by the "Junta," in pursuance of the faculties conferred on them by the *Bases Organicas*, His Excellency orders that the law respecting elections of 27 April 1837, be put in execution under the following regulations:

1. That in Monterey and Los Angeles, being capitals of Districts Ayuntamientos, shall be elected, composed of a first and second Alcalde, four *Regidores* and one Sindico.

2. That in the "Pueblos of San Diego, Santa Barbara, San Juan *Villa* of Branciforte," "Pueblo de San Jose, San Francisco and Sonoma," there shall be elected two Alcaldes, a first and second.

3. That on the second Sunday of the following December *Compromisarias* shall be chosen, who, on the Friday preceding the third Sunday of that month will elect the authorities specified in the preceding articles, observing, as far as necessary, the provisions of the law of 19 June, 1843, in the part relating to "Elecciones, Secundarias," and other articles applicable.

4. That the first Alcaldes will discharge the functions of Judges of first Instance, conformably to the decree of 15 July, 1839, and will also be charged with the Prefectures of their respective Districts.

5. That on the 1st day of January, 1844, the newly elected officers shall enter upon their duties and receive from those going out an exact inventory of the *Expedientes Books*, and everything else pertaining to said "Corporations," in order that it may be passed over to the Departmental Assembly.

Exhibit No. 12 *annexed to the Deposition of M. G. Vallejo.*

A note dated 22d December, 1844, at "San Francisco," signed by persons purporting to be President, Vice President and Secretaries of elections, communicates to the Alcalde elect the notice of his election.

Exhibit No. 13, *annexed to the Deposition of M. G. Vallejo.*

Is an official note addressed by the Secretary of Government to the Alcalde of "San Francisco," respecting auxiliary military force, (dated July 7, 1844.)

Exhibit No 14, *annexed to the Deposition of M. G. Vallejo.*

Is a note of Micheltorrena to the "Alcalde of San Francisco," dated 11 March, 1844, acquainting him with an order that had been given to a military officer, to present himself with 12 or 15 men to the Alcalde of first instance of Yerba Buena, in order to suppress certain disorders which had occured, and enforce due respect to the authority of said Alcalde.

Exhibit No. 15, *annexed to the Deposition of M. G. Vallejo.*

Is a note dated 20 January, 1844, by the Secretary of Governme addressed to the "first Alcalde of the *Port* of San Francisco," knowledging the receipt from him of the inventory of things perta ingto that Juggado.

Exhibit No. 16, *annexed to the Deposition of M. G. Vallejo.*

Is a note dated 5 March, 1845, of the Secretary of Government the first Alcalde of "San Francisco," communicating a decree of Go ernment by which the note says: The Alcalde will be informed the desires of his Excellency, and that his object is to secure by so efficacious mode, the property of the inhabitants of the department doubting that he will have the due co-operation of the respecti authorities.

Exhibit No. 17 *annexed to the Deposition of M. G. Vallejo.*

Then comes the inventory "of 1845 of all that has been archived fr the establishment of the Ayuntamiento in 1835 until the end of t year 1845, and of the furniture, &c., of which Jose de la Cruz Sanch Alcalde going out makes delivery, to the citizen, Jesus Noe, 1st J tice of the Peace coming into office and beginning with the year 184 It is dated at "Yerba Buena," Jan. 15, 1846, and is perhaps the m pertinent and interesting of all the documents, and evidence in t case at it exhibits at a single view the whole patrimony of the "P eblo." It consisted at that date of a desk in which the archives we kept, a plain table, a new cloth carpet of ordinary quality, an inkstan a brass candle stick, four chairs, a very good padlock, two chains, a a pair of fetters which just at that time, however, had been carried but were to be hunted up. There was also an old woolen carpet wh the Alcalde thought to exclude as "used up," after due considerati the old carpet was finally excluded as useless and receipt given the balance by the Justice of the Peace.

Exhibit No. 18 *annexed to the Deposition of M. G. Vallejo.*

POLITICAL GOVERNMENT OF ALTA CALIFORNIA.

Head-quarters General of Alta California.

The Government, satisfied with the zeal and activity which chara terizes you, as well as the patriotism which animates you, sees in yo official note of the 24th October last, a new proof of your veheme desire for the progress, and of your untiring efforts for the improv ment and aggrandisement of your country and of your fellow-ci zens.

In consequence, it affords me pleasure to inform you, in accordan th its request, that the E. D. T. has adopted in its totality, the plan ich you presented in your note aforesaid, with regard to the pueblo San Francisco, declaring the boundaries to be the same that you lineated in the said note. That is, commencing at the little cove at of the Fortaleza, following the line traced by you as far as the shore, ving to the north the *Casamata* and the Fortaleza; thence following e border of the said shore to the Point of Lobos on its southern le; thence following a straight line as far as the peak of the Devi- lero, (Lookout,) continuing the said line towards the E. as far as the int of the Rincon, embracing the *Canutales* and the *Gentil.* Said e shall terminate within the bay of the Mission Dolores, whose estu- y shall serve for a natural boundary between the municipal juris- tion of that Pueblo and the aforesaid Mission de Dolores.

The Government, in proof of the confidence which your services spired, has arranged that you shall be he who will have the honor installing the first Ayuntamiento in that Pueblo of San Francisco, which you have already done so much.

You will therefore proceed at the time and in the mode provided law to the election of the municipal authorities, in order that they installed on the first of January of the coming year, 1835; setting art for public buildings those edifices which to you may seem most propriate.

God and Liberty.

Monterey, Nov. 4, 1834.

Signed, JOSE FIGUEROA.

Military Commander of San Francisco,
DON MARIANO G. VALLEJO.

It is a true copy,
ZAMORANO.

BEFORE COMMISSIONER ALPHEUS FELCH.

“My name is Julius K. Rose; my profession is that of attorney-at- w; my age, thirty years and upwards; and I reside in the city of n Francisco, in the State of California. I have resided in that city ice August, in the year 1849; I did know a person of the name of rancisco Gurrero; I knew him from August, 1849, to the time of his ath, which took place about one and a half or two years ago; I was ry well acquainted with him; he was a client of mine, and was most every day in my office, and I was at his house almost every nday. I have had conversations with him in reference to the undaries or limits of the pueblo, of which the present city of San rancisco is claimed to be a part. I owned a piece of land at the ission, and as it was all the land I had in the world, I felt very xious to know what the title was. To ascertain this I had several conversations with Mr. Gurrero, in one of which I asked him if th land was not included in the limits of the pueblo, the existence which I then took for granted. He replied that it was not, and pr duced a plan of what he called the pueblo; he undertook to expla the boundaries of the pueblo to me from that plan, but as I was ve little acquainted with the shape of the peninsula on which San Fra cisco stands, and knew but little of the Spanish language, he propose to go out some day and look at the lines of the pueblo, and seve other ranches. A few days afterwards, we went out on horsebac and he pointed out the lines to me of what he called the pueblo San Francisco, as well as those of several adjacent ranches, to wit: th northern line of Buriburi, and the lines of Rancho de la Merced, M Noe's rancho, which, I think, was called ‘San Miguel’; Mr. Ridley rancho, which, I think, is called ‘Visitacion,” and a rancho belongi to a Spanish woman, called, I think, ‘The Widow Bernal,’ and th rancho known as ‘The Potrero.’ The limits, as pointed out to me b him from a very high hill, were as follows: he described the bound ries as commencing just at the entrance of the bay at the Golden Gat running from that point, to a hill about half a mile distant from th point; to the hill on which we stood, and which is a very high, rou hill, from that place to the southern extremity of Rincon Point, whe it runs into Mission Bay, and from that point by the line of the ba to the Golden Gate, at the place of beginning. The hill on which w stood was a conical hill, very high and running to a small peak. could be easily distinguished, because it was the highest land in th vicinity, and one that a person would not forget, who had been on once; I have heard it called ‘Devisadero,’ but never heard it so calle until lately; I should think it was about one mile from the first h which I mentioned in describing the boundaries; it may be muc further; I never traveled the space between them. As near as I ca judge, I should think it was about three miles from the Devisadero the place where the line would strike the southernmost extremities Rincon Point in Mission Bay; the point which I call ‘Rincon Poin in Mission Bay, is upwards of half a mile from the point known as Ri con Point, in the city of San Francisco; I cannot tell exactly how fa I considered Gurrero about forty years old when I knew him; he ha been Justice of the Peace and, I believe, Prefect, but am not certai of that; he was a very intelligent man; I think he had a good know ledge of business affairs, and an excellent memory; I have heard remarked, that he was the only Californian capable of holding his ow after the Americans came here; he claimed to be a joint owner wit Mr. Fitch, of a rancho of about half a league, near the Presidio; I b lieve it was under a title derived from a Governor of California. asked him if he thought his title was good, and he replied in a jocul way, ‘that his title to the land was good, if that of the pueblo wa not good.’ ”

Question.—Describe more particularly the point of starting in the scription of boundaries above given.

Answer.—The starting point is a promontory at the mouth of the rbor, near a pile of rocks which are always covered with sea-lions; m this point to the Devisadero, the line is not exactly straight, but viates a little to the small hill before described; the lines would rm an angle at the small hill of about a hundred and fifty degrees; may be mistaken in my recollection of these lines; the land between e Devisadero and the promontory at the starting point is sandy, and some places covered with small bushes; I could go on to the land d point out all these landmarks; I never heard Guerrero say by hom these lines of the pueblo limits had been marked out; I think must have been about the year 1850, in the early part of that year, hen Guerrero pointed out these limits to me; when I examined the ap with Mr. Guerrero, I thought it did not give a correct delineation the shape of the peninsula, but when we reached the top of the gh hill I was surprised to find the shape of the country what it is, d I saw it corresponded with the general features as laid down on e map, but whether the map corresponded with the particular landarks which he pointed out, I cannot say; I have never, to my knowdge, seen the map since. JULIUS K. ROSE.

BEFORE COMMISSIONER ROBERT A. THOMPSON.

My name is Henry L. Ford; my age, thirty years; and residence, olusi County, California, I have resided in California since the 14th September, 1842. In 1843, I knew nearly all the persons who reded in San Francisco at that time. In March, 1844, I was riding om San Francisco to the Mission Dolores, in company with Captain inckley, at that time Alcalde of San Francisco, and in the course of e conversation he stated to me that the pueblo line commenced at a oint of rocks on the coast, beyond the Presidio, and ran over in a diect line, crossing Mission Creek near its mouth, to a point of rocks or oulders, at a place known, at that time, as the "Potrero." Capt. inckley died in 1846; he was regarded as a very intelligent man; I pposed him to be about forty years of age. I had a conversation ith Francisco Guerrero, who died in June or July, 1851. A short me before his death, he was showing me a piece of land on the north de of Mission Creek, which he stated had been granted him by the lcalde of the pueblo of San Francisco; he was standing on the south de of the creek at the time, and he stated, that the land on that side elonged to the Mission, and on the other to San Francisco; he also ointed out to me the way the line ran between the Mission and the ueblo, and where it would strike the bay which was very near the oint formerly shown me by Hinckley; the place pointed out to me y Capt. Hinckley, was just below the juncture of the main creek ith another, coming in on the south side.

Question.—Look on the map, marked A, and with the initials, R T herewith filed, purporting to be a map of the northern portion of th county of San Francisco, and state, if you can identify on said ma the point described in your last answer.

Answer.—It would cross near where the letter R occurs in the word "Mission Creek," which is identified by a small cross on said map; thi place was called "Yerba Buena," when I knew it, from 1842 to 1846 it was generally called "San Francisco," by the Americans and English; the people of the country generally called it "Yerba Buena;" the Mission was called the "Mission Dolores." I believe Francisc Guerrero was Alcalde or Justice of the Peace of this jurisdiction before I came here; during the time that I knew him, he resided part o the time at the Mission and part of the time at his ranch on the coast the piece of land which Guerrero pointed out to me in 1851 as having been granted to him by an Alcalde of San Francisco, he stated t me, was four hundred varas; I think I could point the land out if was at the Mission; Mr. Hinckley lived in this place; the precise spot as near as I can recollect, would be between Clay and Sacrament streets, and between Montgomery and Kearny; Jack Fuller lived between Sacramento and California streets, and between Montgomer and Kearny; in 1845, a Frenchman built a house in what is now know as "Happy Valley"; I do not know whether he owned the land; I know of no other this side of the Mission. HENRY L. FORD.

United States of America, }
State of California. } SS.

San Francisco, April 13, 1854.

This day personally came before Peter Lott, a commissioner for taking testimony to be used before the Board of U. S. Land Commissioners in said State, John J. Vioget, a witness on behalf of the claiman in case No. 280, on the docket of said board, in which the city of Sa Francisco is claimant, and the said witness being duly sworn, on oatl deposed in the English language as follows, to wit:

The U. S. Law Agent is present.

QUESTIONS BY COUNSEL FOR CLAIMANT.

Question 1.—What is your name, age and present residence?

Answer.—My name is John J. Vioget; my age 55 years; I resid now in San Francisco County, California.

Ques. 2.—In what year did you first arrive at San Francisco?

Answer.—I arrived here in July 1837.

Ques. 3.—State whether or not you made a map of the town c

Yerba Buena, and if yea, in what year, and by whose direction was the map made?

Answer.—In the winter of 1839 and 1840, I was requested by the Alcalde, Guerrero, to form a plan of a town, former grants having been made in irregular form; I accordingly made a plan which brought most of those lots in the squares of blocks, some few would fall in the streets, one or two were so situated that the location of them had to be changed.

Ques. 4.—State what portion of the present city of San Francisco was embraced in plan you made out, and laid off into blocks and streets.

(This question objected to by the Law Agent, as improper without the map referred to, being presented.)

Ans.—The west side of Montgomery street was made the base line, and was intended for the city front; then I drew Sacramento street, Clay, Washington, Jackson and Pacific streets as they are now called, then at right angles Kearny street, Dupont, and as Capt. Richardson's house stood angling off from Dupont in that direction which went off towards North Beach; I laid off no streets south of Sacramento street, or west of Dupont street; I laid off the lots on the outside or south side of Sacramento street that had been previously granted; I recollect Fuller's lot on that side; Fuller's was the only lot on that side which I laid off, and Richardson's and Leese's west of Dupont.

Ques. 5.—State whether or not you received any instructions from the Alcalde how to make the plan of the town, or of its limits, and why did you lay off no other streets than those you have named?

[This question objected to by the Law Agent.]

Ans.—The only instruction I got from Guerrero was, to regulate the grants already made, and so as to have a regular plan for future grants, I mean by regulating the grants already made, that I should make my plan to accommodate the lines of the streets and blocks as far as practicable so as to embrace the lots already granted within that plan. There was no limit stated to me, I made no more streets, because I saw no necessity for them, I dotted them off so that they could be made afterwards if they wanted them. In my original map I marked the line from Rincon Point out to North Beach forming the blocks as the nucleus of the town where I have stated, that was on the old map which I sent to the Governor at Monterey.

Ques. 6.—When you were instructed by Guerrero to make the map or plan, did he state to you anything, if so what, as to the authority under which he was proceeding to have the map made?

(This question objected to by the Law Agent as hear-say testimony and incompetent.)

Ans.—He never gave it to me in writing, he told me the Governor Alvarado had ordered it.

Ques. 7.—Is Guerrero the Alcalde now living, if nay, where did he die?

Ans.—Guerrero is dead, I think he died a year and a half or two years ago.

Ques. 8.—State whether or not at the time you made the map or plan you have mentioned, you had knowledge of the existence of any prior map having been made of the town, before yours?

Ans.—I never saw, nor heard of any such.

Ques. 9.—Was or was not Capt. Wm. A. Richardson residing in the town, at the time you made the said map, and do you know whether or not he was aware that you was engaged in making the map or plat

Ans.—Capt. Richardson's family was living in his house, but Capt Richardson was sailing about the bay nearly all the time, occasionally he came home. I do not know whether he knew I was engaged though he must have known it very shortly after it was done. Capt. Richardson's house which I speak of, was up on Dupont street.

Ques. 10.—State whether or not the fact that you were engaged in making the map and plat of the town, was at the time, when you were so engaged, a notorious, and well known fact?

Ans.—The inhabitants saw me doing the work, and I suppose they must have known what I was doing it for.

Ques 11.—When and from whom did you first hear of the map said to have been made by Capt. Richardson of the town of Yerba Buena?

Ans.—I never knew of the existence of any such map till Jose Y Limantour spoke to me of it last year.

CROSS-EXAMINED BY U. S. LAW AGENT.

Ques.—Where did you reside from 1839 to 1846?

Ans.—From 1839 to 1843 I lived in San Francisco on the corner of Clay and Kearny streets as it is now called, the southeast corner, and from 1843 to 1846 I was occupied as commander of a vessel mostly at sea, occasionally coming ashore.

Ques. 2. How were you occupied during the time from 1839 to 1843?

Ans.—I was occupied in trade, I was constantly here about the place during that period.

Ques. 3.—Do you know whether Francisco Guerrero, whom you have mentioned held the office of Alcalde or of Justice of the Peace at the time when he requested you to make the plan which you have referred to?

Ans.—We called him Alcalde, I certainly understood him to be Alcalde at that time, I do not know positively.

Ques. 4.—Look at the paper now shown to you, marked "Exhibit No. 1, A. F. annexed to the deposition of Victor Prudon, filed in No.

74," and state whether it is an exact copy of a plan to which you have referred as having been made by you at said Guerrero's request?

Ans.—This map is a copy not made by me, but is a copy of the map which I made and presented to Guerrero, with the exceptions of the dotted lines at the ends of the streets,. It differs from my map also in the way in which the Plaza or Portsmouth Square is laid down. My map made said Plaza to embrace all the block between Clay and Washington, Dupont and Kearney, except two fifty-vara lots on the west side of said block. This map only makes the Plaza embrace one fifty vara lot. This map also differs from mine in the east part. Montgomery street is not laid off here in the vicinity of the place called on this map "Laguna," as it was on my map. I laid off the blocks on Montgomery regularly as far north as Pacific street, with the exception of one fifty vara lot at the corner of Washington street. The vacant space on this map at the corner of Jackson and Montgomery, was laid out as forming a lot on my map.

Ques. 5. Where did Francisco Guerrero reside and keep his office at the time he gave the order to you to make the plat, and where did he live afterwards till he died?

Ans.—He lived at the Mission Dolores at that time, and always afterwards till he died, I believe. I never knew him to live any where else.

Ques. 6.—Is the Mission Dolores the same place which was known and called by the name of San Francisco de Asis?

Ans.—It was more usually called Misson Dolores. I have heard it called Mission of San Francisco de Asis. It is the same place.

JOHN J. VIOGET.

Subscribed and sworn to before me on this
13th day of April, A. D., 1854.

PETER LOTT,
Commissioner for taking testimony &c.

TESTIMONY OF CAPTAIN HALLECK.

Question 1.—How long have you been in California, in what capacity did you come, and what offices have you held?

Answer.—I came in January 1847; came as an engineer officer to examine the Pacific coast with respect to its military defences, under the orders of the Secretary of War. A few months after my arrival, I was made Secretary of State of California, which office I held till December 1849, and as such had charge of the archives of the former government of California, and retained charge of them until some time in February 1850, at Monterey, when I delivered them over to Major Canby, Assistant Adjutant General. After I turned them over they were moved to Benicia by the Military Department, where they remained until delivered to the Surveyor General.

Ques. 2.—State whether at the time you had charge of the archives it became your duty, under any orders or otherwise, to examine and make reports upon them, and what was your opportunity to examine and know their contents?

Ans.—I was directed by Gov. Mason to examine the archives and report on certain points connected with the law titles, which I did; the examination was not very thorough in consequence of the archives being very voluminous. They were at that time in great confusion, located at different places in the town. Parts of the documents were found in different places. With the assistance of Mr Hartwell I arranged them in the best manner I could under the circumstances.

Ques. 3.—Have you any knowledge of the loss of any of them?

Ans.—I saw a portion of the archives in the Custom House, which was then used as a hospital for the soldiers and marines. They were using them as waste paper. There were supposed to be Custom House documents, until they were examined and of no value. Some weeks after I picked from the floor a mutilated paper, and on examination found it to be part of an expediente of land title. Called Gen. Kearney's attention to the fact, and he sent Mr. Hartwell to examine them. He reported they were part of the archives, mixed up with the Custom House papers, when they were removed to a place of security. Another portion of what now constitutes the archives in the office of the Surveyor General, were brought by Col. Fremont from Los Angeles, in May, 1847. They were packed on mules and considerably torn from running under trees. They were in a very [ ] state. These constitute the papers of the archives at that time. Subsequently individuals brought in others, and when stated to be part of the archives, were filed, and the time of their filing endorsed on them.

Ques. 4.—State whether in the examination of any of these documents, you discovered any relating to the public lands of San Francisco or Yerba Buena, if so, what were they, and when did you last see them?

Ans.—I do not recollect to have seen any title or document defining the title of San Francisco or Yerba Buena. I recollect to have seen documents and correspondence between the Governors, Military Commandants and Alcaldes of the Presidio and Pueblo of Yerba Buena and San Francisco. These names were used indifferently. In these papers the municipal lands and common lands of the Pueblo were frequently mentioned *proprios* and *egidos*.

Ques. 5.—Can you particularize any of these papers?

Ans.—I cannot recollect the documents particularly; in the expediente of the Potrero Nuevo, the boundaries of the pueblo is alluded to, but not defined; showed the document to Jimeno, former Secretary of M. Torena; he said that at that time the exact boundaries of the pueblo were not known to him or M., and for that reason a clause was put in making it subject to that line; this was the expediente of the young De Haro; that he believed the line at or near Mission creek.

Ques. 6.—State whether you have examined the Archives in the office of the Surveyor General, with a view to the title of the pueblo; and if so, whether or not, there is now to be found there all the papers in relation to it, which you saw at Monterey?

Ans.—I have examined within the last year very thoroughly for the correspondence of Gov. Figueroa, Gen. Vallejo and the Alcalde of San Francisco, and find the greater portion of that of 1834 and 1835 missing; the early part of the year 1834 is very complete.

Ques. 7.—Have you seen any documents in the office of the Alcalde of San Francisco, relating to her pueblo rights of land, and if so, state when and what?

Ans.—In February or March, 1850, I was employed by J. W. Geary, first Alcalde, to examine the archives in his office, and select out such papers as had reference to the title of the pueblo lands here for the use of the City Attorney, in a suit between it and Justice Colton; the examination of the archives was commenced but not finished, Colton having absconded; there was a large mass of Spanish documents; I should think a cart load; I recollect that we found documents in the form of letters of the Governors and authorities here, which were deemed sufficient to prove the establishment of a pueblo, and the control of the authorities over the municipal lands of the pueblo; among the papers, I then saw, were the papers now filed in this case, No. 1, 6, 9, 10, 11, 15, deposition (of) M. G. Vallejo, having read and marked them; I remember there were a great many other papers relating to it, letters, decrees, &c.; I recollect one paper which is not among these, being a letter from Governor Figueroa to the Alcalde, subsequent in date to document No. 1 above, with reference to the boundaries of the pueblo, which were to be fixed by the military authority; considered this as an important document leading to the discovery of others, among the military papers in relation to the boundaries of the pueblo; they prove the earliest foundation of the pueblo being filed; these papers were all left in the custody of the Alcalde, and the one mentioned was in date next in order to No. 1 as I recollect; the numbered papers were handed me in 1853, by Major Brenham; the letter of Figueroa recognized the pueblo, and said its boundaries would be marked out by the military authorities; my recollection of the contents of the letter is, that the boundaries of the pueblo would be marked out by the military authorities; I have since my examination in 1850, made a thorough examination for, and have been enabled to find the letter of Figueroa before spoken of; I do not know that it was all, but there was a large mass of military correspondence and documents in the Alcalde's office in 1850, No. 1 was found among the military and not the civil papers.

Ques. 8.—Do you know what became of the papers in the Alcalde's office, when it was abolished? Have you recently, within the last year, made search for them? And if so, what efforts have you made, and with what success?

Ans.—The book of records were transferred to the County Recorder's office. The record of cases in litigation before the Alcalde, were transferred to the district and other state courts. But I never could find the great mass of the ——— documents, and know of no law making any disposition of them. Within the last year I have made search when I thought it likely they would be found, but without success. I have seen a paper in the hands of private individuals, which from their character, I believe was part of them; but these papers of little importance, not relating to the Pueblo title.

John W. Geary was the last Alcalde, he now resides in Pennsylvania; he left here in 1851.

Ques. 9.—State whether or not several fires have occurred in the city which destroyed, &c.

Ans.—Since I saw these records in the early part of 1850, several fires swept over the parts of the city in which the public offices were situated, destroying them; and I know that portions of the records of the courts were destroyed, among them the Mayor's office, &c.

Ques. 10.—State whether you had a conversation with William A. Richardson, whose deposition has been taken in this case in relation to a grant of lots to him near the Presidio; if so, state the whole conversation, and when it occurred.

Ans.—I arrived on the 13th of February, 1847, and on the same day in company with Captain Warner, under Gen. Kearney's orders, examined the fort at the point and the Presidio, with the intention to have them occupied with troops. Within a few days Thomas O. Larkin, or Leidesdorff, his agent, objected on the ground that it belonged to him under a grant to Benito Diaz. I was directed to make inquiries of some of the old inhabitants: I went to Mr. Richardson, who was then Collector of the Port, he said the grant to Benito Diaz could not be good, because the land on which the Presidio was situated belonged to the pueblo of San Francisco: That it was the centre of the pueblo, that he had two lots near the Presidio, and others. He pointed out his at the time in front of the Presidio, we being in a boat at the time; on account of this information and some other obtained by Gen. Kearney it was determined to take and keep possession which was done, notwithstanding the claim of title.

(Objected to, because he had not been put on his guard by asking in relation to the conversation.)

Ques. 11.—What was the character of the documents you saw at Monterey, in relation to the pueblo of San Francisco?

Ans.—The correspondence was literally in this shape: The communication of the Alcalde was generally folded and endorsed, and in the inside the answer or reply was enclosed in it. Sometimes the reply was endorsed on the Alcalde's communication. This correspondence related to affairs in the place. Its general character was to communicate everything as it occurred here. The correspondence of the Alcalde ran through from 1835 until the taking possession by the United States. My recollection of the correspondence is that it dated indifferently pueblo of "Yerba Buena," and pueblo of "San Francisco."

Ques. 12.—Who were the Alcalde's communications signed by?

Ans.—De Haro, Hinckley, and others. There was a long correspondence contesting Hinckley's eligibility as not being a citizen.

Ques. 13.—How many communications did you see there which you can now identify?

Ans.—I think I must have seen a hundred, but of them I can only particularize by reference to their subject matter. There must have been five or six in relation to the Hinckley contest. There were three or four in relation to the troops at the Presidio taking charge of the civil prisoners. I remember a number from the Alcalde, say half a dozen, with reference to the holding the sessions at the Mission, instead of at the Presidio. The Governor at first refused, but afterwards consented, and probably fifteen or twenty communications in respect to elections. I do recollect reports of the receipts and expenditures of the municipal funds of the town.

Ques. 14.—Was the Presidio ever called the "Presidio of Yerba Buena?"

Ans.—I never heard it called the Presidio of "Yerba Buena" but of "San Francisco." The term "Yerba Buena" was generally applied to the place or landing, taking the name from a kind of mint growing there.

Ques. 15.—What is the distance from the Presidio to the landing of Yerba Buena?

Ans.—Two, or two and a half miles.

Ques. 16.—Do you recollect seeing any particular paper among the archives when the lines of a pueblo were spoken of?

Ans.—I recollect only one which was the Potrero Grant to Francesco and Ramon de Haro.

The within minutes of the deposition of Capt. Halleck is admitted to be read in evidence with the same effect as the original, the original having been mislaid or lost, it being understood that the claimant shall furnish a copy of the paper spoken of in relation to the Potrero.

May 13th, 1854. J. H. McKUNE, Law Agent.

DEPOSITION OF WM. A. RICHARDSON.

My name is Wm. A. Richardson; I was born in England, and now reside at Saucelito, Marin County, California; my age is 58 years; I have resided 31 years in California; during the first seven years, I lived at the Presidio of San Francisco. I resided from the latter par of the year 1829, to the early part of 1835, at San Gabriel; from Jul 1835 to June 1841, I resided at Yerba Buena, and from that time unti this date, I have resided at Saucelito, my present residence. I hel under the Mexican government the office of Captain of the Port o San Francisco; I was first appointed to that office by General Figueroa in 1835, but did not receive my commission until January 1837 I held the office until the latter part of the year 1844; November o December, I think. When I came to reside at Yerba Buena ther were no inhabitants there; there had been no lands or lots grante to any individuals at that time, to my knowledge. In the early par of the month of October 1835, I received a one hundred vara lot i Yerba Buena, situated in what is now Dupont street, on the south-wes side of that street, on the north side of the Adelphi Theatre. Ther is a street called Pike street at the back end of the lot. I received i by order of the Territorial Deputation to the Alcalde of the Mission o San Francisco de Asis.

The paper purporting to be a letter addressed by Jose Castro to me bearing date, October 20, 1835, marked exhibit No. 1, with the initia 'A. F.' was not received by me from Castro in person, but I receive it from Don Francisco de Haro, the Alcalde.

I have often seen Jose Castro sign his name; this is his signatur The plan mentioned in the said letter, which I had formed for beginning the settlement at Yerba Buena, is one that I made by order o De Haro, the said Alcalde. The paper purporting to be a ma marked exhibit No. 2, with the initials 'A. F.,' is the original plan; copy of it was sent to the Political Government, by order of the sam Alcalde De Haro. I recommended the situation of the limits of th settlement or town of Yerba Buena to General Figueroa, while at th Mission of San Gabriel in May 1835; I recommended the cleare place for it. There was a plan of Yerba Buena made in 1839, but no by the government or the authorities. It was made by order of th people of the town, and under a survey made by Capt. Vioget. Ther was no other plan adopted by the authorities but the one here presented and marked exhibit No. 2.

There was no pueblo or town of San Francisco before July, 184 When I came here in 1835, the Ayuntamiento of San Francisco hel their meetings at the Mission of San Francisco Asis, and continued t hold them at that place until the war of 1846. When I first cam here, the Ayuntamiento was chosen by a vote of the people. It consisted of an Alcalde, one Regidor, one Sindico Procurador, and on Juez de Campo, or Justice of the plains. I do not recollect how lon these officers continued to be elected by votes. There were sever changes and they were sometimes appointed by the Governor. I hav looked at the document marked Doc. H. J. T., No. 18. I have neve seen it before; I don't know the writing; it is a strange hand-writin to me. I am well acquainted with the hand-writing of Zamorano; have been in the office with him, and have often seen him write and sign his name, and have had documents from him ever since 1828, until his death. The signature at the bottom of the last mentioned paper is not the signature of Zamorano. The words "Es copia conforme," immediately preceding the signature are not in his handwriting. I never heard of a town called San Francisco, being laid off as represented in this document, nor of a grant to a town of that name. I have heard of a grant of land to a town or pueblo called Yerba Buena. In 1835, in the month of October, the Alcalde of the Mission of San Francisco de Asis, Don Francisco de Haro, received orders from the Political Government to lay off a small town at the Yerba Buena for the convenience of locating public offices at the port of San Francisco, for the convenience of the shipping, as the place called Yerba Buena was the general anchorage for shipping at that time. The same orders directed me to assist De Haro in doing it, and the orders also directed De Haro to give me a one hundred vara lot, and to reserve two hundred varas all along the beach for government buildings, and to make a plan of the place selected and measured off for the town. It was laid off as represented by the plan or map marked Exhibit No. 2, with the initials A. F., and the notes thereon. A copy of this plan was delivered to the magistrate De Haro; he requested me to keep the original in my possession. We had no compass at the ime of the survey. The notes on the map have reference to the imits of the town as established by the magistrate. The limits estabished by the magistrate were as follows: They first measured off the wo hundred varas from the beach, for the Government Reserve, in a south-west direction; then they measured off a certain distance to a place intended for a street, which they called "Calle de la Fundacion." I think this was two hundred varas from the Reserve. From this street they then measured off three hundred varas more in the same direction to the south-west; then from the south-east they commenced on the first sand-hill and measured in a north-west direction along the said "Calle de la Fundacion," four hundred varas, and there located my lot; it was the fifth one hundred vara lot. They then continued on the same line to the beach of the bay. The first sand-hill laid in a north-east and south-west direction; the north-east part terminating in the bay to the southward of a small lake which was on the beach; it run to the south-west and terminated three hundred varas from the parallel of the street above named. These boundaries of the pueblo of Yerba Buena were approved by the Territorial Government. I learned this by the letter which was read to me by the magistrate of San Francisco de Asis, when he delivered me the letter before mentioned and marked Exhibit No. 1. In the paper marked Doc. No. 2, purporting to be a certificate of the election of certain persons named therein as Electors for the Ayuntamiento of San Francisco, dated Dec. 7, 1834, I recognize three of the signatures thereon affixed, namely, Francisco de Haro, Francisco Sanchez and Joaquin Castro; the other I do not recognize. Ignacio Peralta, at the time of his election, lived at Rancho San Antonio in Contra Costa; Joaquin Castro and Antonio Castro lived at rancho San Pablo in Contra Costa, and Francisco Soto lived on his farm in Contra Costa near the Mission of San Jose. These persons were all connected by marriage with persons living at the Presidio of San Francisco and the Mission of San Francisco de Asis, and were frequently at these places—sometimes months together; but their permanent locations were as above stated. The father of Ignacio Peralta was living at the time, and resided at the Pueblo San Jose. I don't know whether the rancho on which Ignacio Peralta lived belonged to the father in person, or the father and family. I have known ranchos in California belonging to a father and his family; my rancho in Saucelito and several others; Saucelito was granted so by the Mexican Government. I have seen Ignacio Peralta in the Presidio of San Francisco, and in the Mission of San Francisco de Asis. He was a soldier when I came here in 1822, and for several years after. He did not reside here in 1835 or 1836. There were about twenty-five or thirty persons in the presidio in 1835 or 1836, but I do not believe there were over ten or twelve men. About the same number resided at that time at the mission of San Francisco de Asis, according to my best recollection. The distance from the Presidio to the Mission is little over three miles. I never knew of an Ayuntamiento sitting at the Presidio; when I came here in 1835 they were sitting at the Mission; they always sat at the Mission; sometimes they held no meetings for months together. I don't know if there was an Ayuntamiento in existence when the Americans took possession of this country in 1846. At that time I resided on my farm at Saucelito. Don Francisco de Haro was Alcalde of the Ayuntamiento in 1835, Joaquin Estudillo in 1836, Ignacio Martinez in 1837, De Haro, I think, in 1838; I don't recollect who in 1839. The names of the Alcaldes, between 1839 and 1846, are De Haro, Guerrero, Padillo, William Hinckley, Francisco Sanchez, Jose Jesus Noe, Jose de la Cruz Sanchez. I do not recollect any others.

The Ayuntamientos between 1835 and 1846 were composed of four persons, an Alcalde, a Regidor, a Sindico, and Juez de Campo. De Haro resided in the Mission most of the time, but a part of the time on his farm. Guerrero resided in the Mission; he had a rancho five or six leagues south from the Mission, but was very seldom on it. Pedillo resided in Yerba Buena; he had a rancho at Petaluma, and also, I believe, on Tomales Bay. Hinckley resided at Yerba Buena. Francisco Sanchez resided most of the time on his farm at San Pedro, about four and a half or five leagues south of the Mission. I never knew of his having a house at the Mission; he stayed with his relations when he was there. Most of those persons lived in the old buildings of the

Mission when they were at that place. Noe lived a part of the time at Yerba Buena, but he had a house at the Mission. Guerrero fitted up one of the old houses of the Mission and lived in it.

I don't know how the Ayuntamiento was formed in 1834, not being here. In 1835 it was formed by an election of the people. I don't know how it was conducted, not having assisted in it. I never assisted in any election of an Ayuntamiento before 1846. I never saw any voting for members of an Ayuntamiento here before 1846. I never saw any such voting at the Mission or at the Presidio before 1846. I never voted for a member of an Ayuntamiento. I have heard that such elections were held every year in the latter part of October or in November; sometimes as late as the latter part of December. The polls were open at the Mission; I have never heard of any other place but the Mission; I don't know who voted at those elections; I believe they were private people and soldiers, who came along mixed together. I have heard of cases of naturalized Indians voting. I don't know whether the right to vote depended upon the residence of the voters or not.

I have not the letter or copy of the letter directing De Haro to make the map here presented and marked "exhibit No. 2." I made that map in the early part of October, 1835. The copy I sent to the Governor, I made the same day. The paper on which the map is made, I got from the French ship Hero in the year 1828, or from a schooner called the Krymakoo which was here about the same time. I have some of the same kind of paper yet left, I think; I gave some of it to Capt. Vioget. The copy which was sent to the Governor, was on the same kind of paper; I have also made other copies on the same kind of paper and sent to the Governor; I never saw or heard of any copy being in the Governor's archives except on the receipt of the letter marked 'exhibit, No. 1,' with the initials 'A. F.' The map marked 'exhibit No. 3,' with the initials 'A. F.' has been in my possession since it was made in 1835. Several persons have seen it; I think Mr. Leese saw it soon after he came here in 1836. I do not recollect any others, but it was public, with my other papers and charts about my house. I had, I suppose, twenty or thirty different charts. The map has been inquired for frequently since 1846, particularly in the case of Mr. Bates, who took my testimony about three months ago.

Since the year 1846, I have resided at Saucelito; I have been some away from home; I have been up and down the coast several times, and once as far as the city of Mexico. I was at the city of Mexico in June 1852, and remained there about eleven days. I have been acquainted with the map of the village of Yerba Buena ever since it was laid off by me. I assisted in measuring and defining the line as laid down on the map. I could at any time since the map was made, describe from memory, those limits, and point out the natural objects included in those limits. I have pointed them out to persons since the

year 1846. I was very particular in pointing them out to Mr. Vioget
when he was altering the plan and making a survey of the place i
1839.

In 1843, when I sent a copy of this map to the Government,
pointed them out to several persons. I recollect that I pointed the
out to a man called Jack the Soldier, Messrs. Rose and Reynolds, shi
carpenters, Gregorio Escalante, a Manilla man, who, I think, lives at th
Mission; there were several others whom I do not recollect. Messrs
Rose and Reynolds live in Napa. At the time of the war in 1846 o
1847, when Commodore Biddle was lying at Saucelito, in the Columbus
I spoke publicly, down in front of William Davis' house, which is no
Montgomery street. I explained the limits of the town, where it cam
down to on the beach, and the whole limits round; as they were givin
lots outside those limits, I opposed it, as I had applied for lots outsid
the limits of the town and never could obtain them, and it was con
trary to Mexican law. A simple magistrate had no authority to do i
I applied for lots to Figueroa in his time, that is in the year 1834. I
1828, likewise, I applied to General Echandea, who was then Com
mandante General and Governor. I also applied to Alvarado, th
Governor of California. This was about the year 1840 or 1841. Th
last time I applied was with the knowledge of John B. Cooper, o
Monterey, who was to have part of it. My application in each cas
was rejected on account of the lands being occupied by the militar
post of the Presidio, for the convenience of their horses. The lan
located about half way between what is now called Clark's Point an
Rincon Point, along the beach. I applied every time for the sam
piece of property. I also recollect making application to Don Lui
Arguello, Governor of California in 1825, for the ground afterward
occupied for the site of Yerba Buena. The grant for the one hundre
vara lot was made me by Don Francisco de Haro, the Alcalde of th
Mission de San Francisco de Asis, by order of the political govern
ment. The document of that grant was lost, and I obtained anothe
document for it in 1836, from Don Joaquin Estudillo, Alcalde of th
same place. There were several grants made of lots in Yerba Buen
before 1846. Some were made by the magistrates residing at the Mis
sion of San Francisco de Asis, and others by the different Governor
of California.

By magistrates I mean the Alcaldes and Justices of the Peace. Th
Alcaldes were members of the Ayuntamientos. I never saw any c
the Justices of the Peace acting with the Ayuntamientos. The A
caldes who made these grants resided at different places; at the Mis
sion of San Francisco de Asis, at Contra Conta, and at the settlemen
of Yerba Buena. I saw a hundred vara lot in Yerba Buena measure
off by Ignacio Martinez, who resided at Contra Costa at that time, bu
was Alcalde of the Mission of San Francisco de Asis. This was i
1837. I don't know whether Contra Costa was a part of the land be

onging to that Mission, but understood that it was under the jurisdicion of the civil authorities of the Mission of San Francisco de Asis. t was not in that jurisdiction continually, but was sometimes under e jurisdiction of the pueblo of San Jose.

I heard of people having lots at the Mission of San Francisco de sis, but never saw any documents relating to them. I never heard om whom these grants were obtained. I did hear about Padre Sanllan having sold lands, or given lots, but do not recollect at what me. The lots they were granting at the time I was complaining, ere situated at the South East of the settlement of Yerba Buena, owards Rincon, at a place now called Happy Valley. I never had a onversation with any one when I was in the city of Mexico, about e limits of what is now claimed to be the pueblo of San Francisco. had no conversation with any one about the limits of Yerba Buena. saw Mr. Limantour in Mexico. He never asked me anything relecting the limits of San Francisco nor Yerba Buena. I went to exico on my own private business, respecting my lands. I have no roperty in San Francisco now; I have a piece of property north of e Presidio on a little plain, between the Presidio and the bay. It is ne hundred and fifty varas square. I claim that property by a grant om Governor Arguello. I have no interest, direct or indirect to any nds or claims to lands in or near the present city of San Francisco, xcepting my farm at Saucelito, where I reside. From November, 834, to May, 1835, I resided at the Mission San Gabriel. In Noveme̲r and December, 1834, I was on the road from San Gabriel to Marnez' farm and at the Mission of San Francisco de Asis. I returned ack to San Gabriel and arrived about the 21st or 22d of December. left San Gabriel in the early part of May, 1835, with my family, company with General Figueroa to remove to the Yerba Buena. I ent to see my father-in-law, and arrived here with my family in the tter part of June, and pitched my tent here to await the orders of eneral Figueroa. Jacob P. Leese was the first settler who came here fter me; he came and built his house on the 3d of July, 1836. His t was adjoining the lot I had possession of to the south-east.

Gen. Figueroa told me he had seen a communication of mine to en. Echandea respecting the anchorage at Yerba Buena. He asked e if there was any spot sufficient to lay off a small village or town. told him there was one abreast of the anchorage where the vessels y, a small place. He asked me the extent, and wished me to give m a small sketch of it, which I did, stating the dimensions to the est of my knowledge of the clear spot. The sketch I made exhibited e land, and stated the extent to be about four hundred varas from e beach opposite the anchorage in a south-west direction; and the rection of the valley run about north-west and south-east about velve hundred yards. I told him there were very few springs and it as very scarce of water. The land above described, as exhibited by e sketch was clear of bushes. The anchorage used by vessels entering the bay when I first came to the country was at the eastern sid of the old fort, opposite the Presidio, and at the entrance of the bay It continued there until December 1824, or the spring of 1825. Fron that time they came to anchor at the place called Yerba Buena There had never been a captain of the Port here before. I was appointed in 1835. The Comandante of the Presidio acted as everything; there was no Captain of the Port. I do not recollect who wa the Comandante in 1834 and 1835; it was sometimes a soldier. was here in 1834, but did not see M. G. Vallejo here; I did not go t the Presidio. I was at the Presidio in 1833, and he was then residin there with his family, and was Comandante in 1834. I did not se him, but understood he was on his farm at Petaluma, and left a soldie or corporal in charge at the Presidio. This is the only time I wa here in 1834. There might have been sixty or seventy inhabitant altogether in this city in July 1846. I do not know what time General Vallejo ceased in the command. It was customary for Comandantes to go away and leave others in charge for a time.

WM. J. RICHARDSON.

POLITICAL GOVERNMENT, AD INTERIM, OF UPPER CALIFORNIA:

This Government, conforming with the good desire of my predecessor, Senor General Don Jose Figueroa, regarding the foundation o a settlement in the place called "La Yerba Buena," and attending, likewise, to the statement made by you, in the name of the residents o the port of San Francisco, the welfare of which I sincerely desire, ha approved the plan which you have formed for the commencement o said settlement; which, (while other matters are arranged, togethe with the system of civil authorities) will be borne in mind, in thecase of granting lots to the individuals who may solicit them.

All which I state to you for your satisfaction, thanking you for the services which gratuitously, you propose to do in favor of those residents.

God and Liberty,

Monterey, Oct. 20, 1835.

(Signed) JOSE CASTRO.

To SENOR DON GUILLERMO RICHARDSON,
Captain of the Port of San Francisco.

UNITED STATES OF AMERICA, }
State of California. } S.S.

San Francisco, March 25, 1854.

This day personally came before Peter Lott, a commissioner for taking testimony to be used before the Board of U. S. Land Commissioners in said State, William A. Richardson, a witness on behalf of the United States, in case No. 280, on the docket of said Board, in which the city of San Francisco is claimant, and the said Wm. A. Richardson being duly sworn on oath, deposed in the English language as follows, to wit:

QUESTIONS BY U. S. LAW AGENT.

Question 1.—What is your name, age and present place of residence?

Answer.—My name is William A. Richardson; my age 58 years; my residence Marin county, California.

Ques. 2.—Where was reputed to be the boundary on the side towards the port of San Francisco of the Old Mission, and the so called Pueblo of San Francisco de Asis?

Ans.—Mission Creek was reputed to be the boundary.

Ques. 3.—Was the place called Yerba Buena or the plat formed in it for the concession of *Solares*, ever considered as embraced in the actual limits of said Mission or Pueblo of San Francisco de Asis?

Ans.—No it was not.

(This last question and and answer objected to by attorneys for claimants on substantial grounds, and not merely to the form.)

CROSS EXAMINATION BY ATTORNEYS FOR CLAIMANT.

Question 1.—What were the old limits of the Mission of San Francisco de Asis?

Ans.—I do not know what the southern and eastern limits were, but it never passed the creek towards the port.

Ques. 2.—Do you know what the western boundary of the Mission was?

Ans.—The coast of the Pacific.

Ques. 3.—What was the reputed extent of the Mission lands in leagues or square miles?

Ans.—It is hard to tell, to the best of my judgment I should say it would run about six leagues one way and about three the other; the three leagues would be in a direction from the Pacific coast to the bay, and the length would run about north-west and south-east.

Ques. 4.—Do the Mission buildings stand on the north or south side of Mission Creek? and how far from it.

Ans.—On the south side, a little over a half mile from the creek.

Ques. 5.—What was the north boundary of the mission lands west of the Mission buildings?

Ans.—It followed up the ravine of Mission Creek to a round hill called the Devisidero, there are two hills which were called by this name, the other is nearer the old fort, where the new Telegraph station now is, the boundary continued from the round hill first mentioned to the Pacific coast.

Ques. 6.—State your means of knowing that Mission Creek formed the northern boundary of the mission lands?

Ans.—I know that the lands this side of the creek, on the north, were used by the horses and cattle of the Presidio, and there were frequent disputes about the boundary; I recollect when I first came, that there were Indian huts on the north side of this ravine, on a line from the Mission towards the north, about 400 or 500 yards distance; I think at that time the stream ran by those huts, but in the freshet of 1825 the sand hill was washed away, and that brought the stream nearer to the Mission buildings, where it now is; there formerly was a lake about 7 or 800 yards from those huts in a direction to the Pacific coast, where the spring use to head.

Ques. 7.—Was the place where those Indian huts stood known by any particular name, if so, what was it?

Ans.—I know of no particular name, except the "Rancheria."

Ques. 8.—Do you know a place called "Canutales?" and if so, is it to the north or south of the north line of the Mission lands, as you have now described that line, and how far distant from it?

Ans.—I do know all the little valleys north of that line go by that name, they are covered by a peculiar growth of a little weed something like a reed, with black rings around it.

Ques. 9.—Do you know the Spanish term by which Indians were known and designated at that time?

Ans.—Yes! Neophytes, they were the Christian Indians, the others were called Gentiles.

WM. A. RICHARDSON.

Subscribed and sworn to before me, on this 25th day of March A. D., 1654.

PETER LOTT,
Commissioner for taking Testimony, &c.

Filed in office, March 25, 1854,

George Fisher, Secretary.

DEPOSITION OF JUAN B. ALVARADO.

My name is Juan B. Alvarado; age 44 years, and my place of residence is in the county of Contra Costa, in the State of California. I have resided in California ever since my birth. I will name in order the offices I have held under the Mexican Government. I was first an officer in the Treasury, then Secretary of the Territorial Deputation then Inspector in the Maritime Custom House at Monterey, then Deputy in the Territorial Deputation, then Governor *ad interim* of Cali fornia; also Colonel of the Militia of the Territory, Constitutional Governor of the Department of the two Californias, and Deputy from California to the General Congress of Mexico. I was a member of the Territorial Deputation all the year 1834, and some months of the year 1835. I recollect that at that time there were two Secretaries of the Political Chief, but I don't know when they changed; one was Augustin V. Zamorano, the other was Francisco Castillo Negrete. I am acquainted with the signatures of Jose Figueroa, Political Chief of the Territory at that time; I have seen him sign frequently; I have seen the paper marked "Doc. No. 1," purporting to be a dispatch from Jose Figueroa to the military commandant of San Francisco, and do not believe it to be the genuine signature of Figueroa in its totality, because I find a little difference in it, which might have been caused by the haste in which he might have signed many other dispatches at the same time.

I have seen the document marked "Doc. H. I. T. No. 18," purporting to be a copy of a dispatch from Jose Figueroa to Don Mariano G. Vallejo, Military Commandant of San Francisco; consider the words "Es copia conforme," and the signature Zamorano, and cannot justify the words nor the signature, because I do not find it exactly as he used to write it. I am not acquainted with the hand-writing of the body of the letter. I have seen the book marked on the outside cover "Libro Borrador, de Actas de la Exma Deputacion 1834 and 1835; sesions publicas;" and at the head of the first page, the words, "Sesion de 8 de Julio," and concluding on the last page with the signature of Manuel Jimeno. I consider this book as the genuine book that was kept by the Territorial Deputation as the Journal of their proceedings from July 8th, 1834, to October 16th, 1835. It appears that it commenced with July 8th, 1834, and concluded with the 16th of October, 1835. I recollect the circumstances connected with the establishment of the Ayuntamiento of San Francisco. It appears to me the Ayuntamiento was established by the authority of Figueroa.

Question.—Look at the paper now presented to you, marked "Doc. No. I, H. I. T." annexed to the deposition of M. G. Vallejo, filed in this case, and say whether you remember anything respecting the decree of the Territorial Deputation cited therein.

Answer.—I recollect that the Political Chief, Figueroa, with the Territorial Deputation, determined to establish an Ayuntamiento in San Francisco, and by virtue of this decree it was established.

Ques.—Do you know, or have you had reason to believe that any tract of land was ever assigned to a pueblo or town of San Francisco, by the Territorial Deputation, or the Departmental Junta, or Departmental Assembly, or any other competent authority in California?

Ans.—I do not recollect that there was any action in relation to the matter. I do not know whether any land was ever assigned as "proprios" or "egidos" to the pueblo of San Francisco. I did not know any pueblo in California called the pueblo of San Francisco, before July, 1846. I knew this place, where the city of San Francisco, now stands, before July, 1846, by the name of the pueblo da la Yerba Buena.

Ques.—Were any lands ever assigned to the pueblo of Yerba Buena as "propios," or "egidos," or "tierras comunes," or were any limits ever assigned to said pueblo prior to July, 1846?

Ans.—At one time some portion of land was designated to this town by the Political Chief; as regards the limits, I do not recollect of their having been fixed as a town. I recollect that the Ayuntamiento of San Francisco held their sessions sometimes in the Presidio of San Francisco, and sometimes at the Mission Dolores. There was a movement in the Ayuntamiento, and its place of meeting was not permanent; this I have heard stated but have not seen it. The Presidio may be one league, more or less, from the place where we now are; I cannot state positively. At the Presidio, in 1834, or about that time, there might have been forty persons, more or less, not including the soldiers. I think there was an Alcalde for the first time in 1834. I do not recollect the day or the month when the Ayuntamiento began to hold their sessions here but I believe it was in 1834. I cannot state when they ceased to hold their meetings there. There was no place known as the public plaza or square at the Presidio except the military plaza; it was situated in the Presidio itself; it was three hundred Spanish varas, more or less, on each side.

Ques.—By what authority, after the Mexican Independence, were municipal lands or egidos assigned to towns?

Ans.—I recollect a law given by the Cortez of Spain in 1813, which regulates the political economical government of the provinces beyond the seas. This law provides the manner in which the municipal lands shall be assigned to towns already established, or which may hereafter be established. I do not recollect any decree of the Congress or President of Mexico recognizing those laws as in force in California, but I am certain the said Spanish law was ordered by the Mexican Government to be observed by all the Governors within the territories of the Mexican Republic, and it was acted upon. I cannot tell when the sessions of the Ayuntamiento were held at the Mission. I stated before, that the Ayuntamiento was changing its place of holding its sessions from the Presidio to the Mission, and was sometimes held at the one place and sometimes at the other, but I cannot tell at what particular time it was held at each. I visited Yerba Buena and the Presidio for the first time in the year 1822; I lived in San Francisco in 1822 and 1823; I lived at the Presidio of San Francisco. I canno tell exactly the date when the first inhabitants first settled on the site of the present city of San Francisco; it was subsequent to the year 1822. So far as I understood there were very few settlers at Yerba Buena in the year 1834 or 1835; from what I heard stated about that time, there were not more than ten or twelve. I do not recollect whether I was at Yerba Buena at that time; I was there twice between the years 1835 and 1846, but I recollect only the time of the last visit, which was in 1846; there might have been from twenty to thirty houses at Yerba Buena previous to 1846.

Ques.—Look on the book here presented to you and marked on the cover "1840, Sesions Publicas," and closing with the signature of Manuel Jimeno Prenato and Jose Q. Fernandez Srio, and state what the book is, and what is the first communication contained in it.

Ans.—I know the book; it is the book of the Sessions of the Departmental Assembly; I have examined the first communication in it, and it contains the acts of the Assembly as therein stated. The recommendations contained in the first communication, came from me; I was then Governor of California. I do not recollect any law or authority in California for giving or measuring municipal lands to towns or pueblos, except the Spanish law, and authority existing previous to the declaration of Mexican Independence in 1821. The present town of San Francisco is within the ten coast leagues.

Ques.—Look at the paper here presented to you, being one enclosed among others in a paper cover, marked on the outside, "Comunicaciones al E. S. Gobernador," and state what the same is.

Ans.—I have seen and examined the paper, and state that it contains a petition to the Supreme Government upon subjects which at that time were thought necessary for the country.

Ques.—Look at the paper now presented to you, marked "No. 3," dated "Monterey, 8th April, 1840," and signed by Manuel Jimeno, and state whether it is part of the same proceedings, and whether you recognize the signature thereto as genuine.

Ans.—I recognize the document as containing a portion of the substance of the contents of the paper shown me before, and I recognize the signatures (names) of Manuel Jimeno and Jose C. Fernandez thereto, as the genuine signatures of those individuals.

Ques.—Did the Supreme Government of Mexico ever, to your knowledge, take any action on the subject of that petition in relation to the grants of Mission lands, or in relation to the grants of land within the ten littoral leagues, or as to the granting lands within the ten littoral leagues? If so, state what action.

Ans.—I do not know whether the Supreme Government of Mexico ever received the said petition, or whether it answered it; but I do now recollect of having seen a communication from the Minister of the Interior, of Mexico, addressed to General Micheltorena, and received by General Castro during the voyage of General Micheltorena to Mexico, in which mention is made of a grant made to Mr. Smith of Bodega, by Micheltorena, by which communication the Government approved the said grant made to Smith, but with orders not to make any such grants to any foreigner, and stating that if he did so, Government would make him responsible for it. The above is the substance of said communication, although perhaps not in the same words. I believe this was in 1846; I am not very certain, but think it was in the latter part of 1845, or in the year 1846. My connection with the Government of California in an official capacity commenced in 183 and closed in 1842. I was elected Deputy to the General Congress o Mexico in 1845 or 1846, I do not recollect which. The Governor of California from the year 1827 to 1846 were, first, General Jose Echandia; he was Governor from the year 1827 to 1830. Genera Manuel Victoria, from 1831. In 1832 there was no Governor. From 1833 to 1834, General Jose Figueroa was Governor. General Jose Castro in 1835; and during part of 1835 and 1836, and part of 183 Mariano Chico and Nicholas Gautierez were Governors. I was Governor from 1837 to 1842; Micheltorena in 1843 and 1844. Pio Pico was the last Governor. Five or six claimed to be Governor in 1832, but nobody acted in that capacity. They all wanted to be Governor, including myself. I do not recollect the exact period when the Governors mentioned in my last answer succeeded each other. There were many changes and none of them served out the Constitutional terms. The pueblo of Yerba Buena was known by the people of the country by the name of Yerba Buena, but by persons who came by sea, it was called the port of San Francisco.

JUAN B. ALVARADO."

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United States of America, }
State of California. } SS.

San Francisco, March 23, 1854.

This day personally appeared before Peter Lott, a commissioner for taking testimony to be used before the Board of U. S. Land Commissioners in said State, Juan B. Alvarado, a witness on behalf of the United States, in case No. 280, on the docket of said Board, in which the city of San Francisco is claimant, the said Juan B. Alvarado being duly sworn, deposed in Spanish, which was interpreted then and there by the interpreter for said Board, into English, as follows, to wit:

U. S. Law Agent present.

QUESTIONS BY J. H. McKUNE.

Question 1.—What is your name, age and present place of residence?

Answer.—My name is Juan Bautista Alvarado; my age forty-five years, and my place of abode is the county of Contra Costa, California.

Ques. 2.—In your deposition given before Commissioner Felch, on the 12th day of August, 1853, in answer to question 20, therein, you say, "At one time some portion of land was assigned to the pueblo of Yerba Buena, as propios egidos or Tierras comunes, by the Political Chief." Please explain fully what you mean by that portion of that answer; what do you mean by there being a grant of land, and the facts referred to constituting what you call that assignment of lands to Yerba Buena; state fully the facts, within your knowledge, respecting the existence of the municipal organization called San Francisco de Asis, called the pueblo of that name, and the situation during the same time, of the place called Yerba Buena, and the relation which it occupied with respect to said Mission or pueblo, stating also the limits, if any existed, of the said Mission or pueblo, on the side towards the port of San Francisco, and what localities were embraced in the place called Yerba Buena?

Ans.—In the year 1835, General Castro exercised the functions of Political Chief of the Territory, and senior member of the Territorial Deputation in consequence of the death of General Figueroa; he was Commanding General and Political Chief at the time of his death. I recollect that the Political Chief, Castro, in consideration of a solicitation of varions citizens of the Presidio of San Francisco, consented by giving an order that there should be given to them lots according to their petition; he gave an order declaring his consent that there might be granted lots. The Political Chief, Castro, declared his consent to the solicitation of several of the residents of the Presidio of San Francisco, to the effect that there might be granted by the Alcalde or Civil Judge of the residents of the Presidio and contiguous ranches, some lots in Yerba Buena, having present a diagram that embraced a certain portion of the land of the said Yerba Buena, remitted to said Political Chief by some person resident at this place, and according to my recollection of what the diagram represented, it would not be in extent more than a piece of land three hundred varas on each side, a little more or less, that is, calculating what the diagram or map might embrace. This is the same grant referred to by me in my former deposition, spoken of. I know of no other grant in this connection. I recollect that in the year 1835, there was established at the Presidio or Mission of San Francisco, some civil authority, but I cannot recollect whether there was an Ayuntamiento, San Francisco de Asis was the very anciently established mission as all the others of California. I recollect that in 1839 the said Mission of San Francisco de Asis was secularized, giving it the name of *pueblo*, the same as had been given to other Missions secularized prior to this, during the time of the government of General Figueroa. I cannot at this time recollect whether any boundaries were determined to this pueblo of San Francisco, but it was the residence of the municipal authority, as in the division of the department into districts and *partidos*, this place of San Franciseo de Asis or Dolores, was called the capital of the partido, for the residence of a Sub-Prefect or Justice of the Peace. Respecting the locality of Yerba Buena, I have already said that there were no other limits assigned to it than those to which I referred in the varas of land (las varas de Terreno), a little more or less of the said diagram, with the exception of two hundred varas from the beach to the land, which the Government reserved for purposes that might be convenient. This is what I can at this time recollect in relation to the matter.

(This question and answer last written is objected to on the ground of its relating to matters that ought to be proved by documentary or record evidence.)

Ques. 3.—What part of the present city of San Francisco is situated on the former site of the port of Yerba Buena.

Ans.—There has never been recognized amongst us any port of Yerba Buena; there was a bay or anchorage called Yerba Buena The portion of the bay lying in front of the present plaza, between Clay and Washington streets, was called the anchorage of Yerba Buena.

Ques. 4.—What was the northern limit of the pueblo of San Francisco de Asis?

Ans.—I do not recollect that any limits were assigned to the Mission before it was made a pueblo nor since. The Mission was large though I do not know what boundaries were given to the pueblo.

Ques. 5.—Did any municipal organization ever exist during the time of the Mexican Government at the place called Yerba Buena?

Ans.—There was here, as in all other parts of the department, local authorities established at that time. Since 1839, when the department was divided into districts and *partidos*, the denominated Pueblo de San Francisco de Asis (or Dolores) was the residence of the local authorities, and previously when it was a Mission and not a pueblo, it was also the residence of the Alcaldes, or Ayuntamientos being denominated these authorities also of the Yerba Buena. I recollect no other municipal organization here at that time.

CROSS-EXAMINATION BY MR. PEACHY AS ATTORNEY FOR THE CITY OF SAN FRANCISCO.

Ques. 1—Please state if you know of any lots of land having been granted by any authority, during the existence of the Mexican Government in California, within the limits of the present city of San Francisco, if yea, by whom, and by what authority?

Ans.—I, according to my recollection, while Governor, made some grants within the limits here mentioned, since 1839. I may have made some before. The Alcaldes, Ayuntamientos, the Prefects and Sub-Prefects, each, according to the authorities they had from the Government, may have made grants of lots (solares). I know posiively that the Alcaldes, Ayuntamientos, and Justices of the Peace, made some grants within those limits during that time; this might have been done before 1839; it is possible; they made such grants by the authority of the Governor of the Department or Territory.

Ques. 2.—From what source did the Governor derive his authority to delegate to Ayuntamientos, Alcaldes, and Justices of the Peace the power of granting lands?

Ans.—From the Colonization Laws themselves, which did not prohibit him from delegating this power when giving to the Governor that of making grants to families or particular individuals.

Ques. 3.—What Colonization Laws to you refer to?

Ans.—The law of August 1824, and the law of 1828; there may be another law referring to this subject, though I do not recollect certainly.

Ques. 4.—Was the power of the municipal authorities of all pueblos in California, to grant town lots, derived from the Governor of California?

Ans.—It was, but sometimes from the Prefect, who exercised all his functions subordinate to the Governor. Generally the local authorities made grants of lots (solares) in each pueblo, obtaining the power from the Governor, or some of his inferior authorities, as the case might be.

Ques. 5.—What was the size of the lots of land usually granted in the different pueblos to an individual?

Ans.—They were granted of different sizes to different individuals, in San Francisco of different sizes; I do not recollect the smallest size. There may have been in Yerba Buena concessions of lots of 200 varas; I do not recollect the shape and cannot say whether it was square varas or *varas square*, it was not customary to grant 50 vara lots, but at one time an order was given by the Governor to the Alcalde here, to grant no lots of larger size than 50 varas for a time.

JUAN B. ALVARADO.

Subscribed and sworn to before me on this 24th day of March, A. D., 1854.

PETER LOTT,
Commissioner for taking testimony.

BEFORE COMMISSIONER HILAND HALL.

My name is W. E. P. Hartnell; my age is fifty-four years; and I reside in Monterey.

Question.—Examine the paper, marked H. T. S., No. 18, attached to the deposition of M. G. Vallejo, heretofore taken in this case, and say, if you recognize the hand-writing in which the body of the paper is written?

Answer.—I do not. I think the signature of Zamorana, affixed t the paper, a very suspicious one at best, and I do not believe it to b his hand-writing. W. E. P. HARTNELL.

Uɴɪᴛᴇᴅ Sᴛᴀᴛᴇs ᴏғ Aᴍᴇʀɪᴄᴀ,
State of California. } SS.

San Francisco, May 10, 1854.

This day, personally came before Peter Lott, a commissioner fo taking testimony to be used before the Board of U. S. Land Commissioners in said State, Francisco Sanchez, a witness in behalf of th United States, in case No. 280, on the docket of said board, wherei the city of San Francisco is claimant, and the said witness being dul sworn, on oath deposed in the Spanish language, which interprete into English by the interpreter to said board as follows, to wit:

The attorneys for the claimant are present.

QUESTIONS BY U. S. LAW AGENT.

Question 1.—What is your name, age and place of residence?

Answer.—My name is Francisco Sanchez, my age forty-eight year my residence San Francisco county, California.

Ques. 2.—How long have you resided there, and what offices hav you held under the Mexican Government?

Ans.—I have lived in what is now called San Francisco count since I was a small boy; I was born at the Mission of San Jose; I wa first municipal elector for choosing members to the Departmental Assembly at Monterey, that was in 1836. In 1835 and 1836 I was Secretary to the Ayuntamiento of San Francisco. From 1837 to 184 I was military commandant of San Francisco at the Presidio. In 184 and 1843 I was Justice of the Peace of San Francisco; that is all th offices I have held.

Ques. 3.—Look at the marked "Doc. No. 3," H. J. T., annexed t the deposition of M. G. Vallejo, heretofore taken in this case, and stat if you know the location of the place therein called the Pueblo San Francisco de Asis, and the plaza of said pueblo therein mentioned?

Ans.—The election spoken of in the document, was held at th presidio, and the place here called the pueblo was at the presidi afterwards it was at the Mission Dolores. The plaza in this documen referred to is the plaza at the presidio. There was no pueblo there a that time, though they called it so in the document.

Ques. 4.—Look at document marked "Doc. No. 2, H. J. T., annexe to the deposition of M. G. Vallejo, taken before Commissioner Harry J. Thornton," and say whether there was ever more than one election at the presidio; if any, state whether this document relates to that election?

Ans.—This paper relates to the first election held at the presidio, it was held at the house of the commandant of the presidio, at the time when the Ayuntamiento was established. The other paper (Doc. No. 3) relates to a second election held at the same place, to elect the new officers of the Ayuntamiento.

Ques. 5.—Where did Bartolo Boyerguez reside at the time of the first election of which you speak?

Ans.—He lived with his family at the presidio of San Francisco; he lived there a long time before that and afterwards; he was there in 1837.

Ques. 6.—Explain why the presidio was discribed in Doc. No. 3, as a pueblo, when it was not a pueblo, as you have stated in your answer to third question; and state where the pueblo was afterwards located.

Ans.—As it was an election held by the people (pueblo) assembled to elect their representatives, the name of pueblo was given to it by the president of the municipal meeting or assembly of the people (pueblo) to elect their representatives. In 1837 the pueblo was moved to the Mission Dolores, in consequence of the Mission Dolores having been made the capital (cabezera) of this district, by Governor Alvarado.

Ques. 7.—Look at documents No.'s 5, 7, 8, 13, 14, and 16, annexed to said deposition of M. G. Vallejo, and say if you know where is the locality of the place referred to in the address, or otherwise in said documents called San Francisco de Asis and San Francisco.

(Objected to by attorney for claimants, on the ground that it called for the construction of written documents, and not for facts, P. L.)

Ans.—In the address in Doc. No. 5, San Francisco de Asis refers to the Mission Dolores. In Doc. No. 7, San Francisco de Asis refers to the Mission Dolores. In Doc. No. 8, Pueblo de San Francisco de Asis refers to the locality of the Mission Dolores, the document was written there. In Doc. No. 13, San Francisco refers to the same place. In Doc. No. 14, San Francisco refers to the locality of Mission Dolores. In Doc. No. 16, San Francisco refers to the same locality of the Mission Dolores. At the time of the last document No. 16, the court was held here where San Francisco now is, because Hinckley had changed it.

Ques. 8.—What office did Hinckley hold, and during what period, and how did he get such office?

Ans.—He was Justice of the Peace from January, 1844, to January, 1845; he was appointed by the Governor of the Department.

Ques. 9.—What was the territorial extent of his jurisdiction?

Ans.—From the arroyo of San Francisquito to the port of San

Francisco. The place called Pulgas ranch was embraced in what was the jurisdiction of said Justice of the Peace.

Ques. 10.—Where did Jose de la Cruz Sanchez, Felipe Briones, Gabriel Castro, Manuel Sanchez, Francisco Sanchez, Ygnacio Peralto, Joaquin Estudillo, and Candellario Valencia, reside at the time the elections were held at the Presidio of San Francisco.

Ans.—At that time Jose de la Cruz Sanchez lived at the Presidio: Gabriel Castro, Manuel Sanchez, Francisco Sanchez, and Joaquin Estudillo at the same place; Felipe Briones lived at the rancho de Pinone, in Contra Costa; Ygnacio Peralta lived at the rancho of San Antonio, in Contra Costa; Candellario Valencia lived at the Presidio also.

Ques. 11.—How long did they respectively live at those places after that time?

Ans.—After the Ayuntamiento was established at the Mission; some of them moved there and some to ranches, but I do not know when each one moved.

Ques. 12—State about how many voters attended each of the elections at the Presidio, and from what parts of the country did they come there to vote?

Ans.—I do not know how many voters attended those elections. They came from Contra Costa, Sonoma, San Rafael, and other places embraced in the jurisdiction. The voters were anxious to come to the election, and spared no exertion to do so, as they were anxious to get rid of the military authority.

Ques. 13.—Did you know Francisco Guerrero in his life time; if yea what office did he hold; where did he and his family reside, and where did he keep his records and office?

Ans.—I knew him from 1833 till he died. From 1839 till 1841 he was Justice of the Peace at the Mission Dolores, and lived with his family, and had his office and records there. I think in 1845 he was Sub-Prefect, and had his office at the Mission. His records and archives were there at that time.

Ques. 14.—While you were military commandant in 1845, was the petition of Benito Diaz for a tract of land known by the name of Point Lobos, bounded on the north by the sea, which runs into the port of San Francisco, on the south by the ridge of hills at the rear of the Mission of San Francisco, known as the hills of the Deep Lake (Laguna Hinda), on the east by the high ground, and on the west by Point Lobos, referred to you for report; if yea, state whether at that time you reported the same to be public lands of the nation, and whether in fact it was public land at the time?

Ans.—Yes; in 1845 while I was military commandant such a petition was referred to me, by the Governor, to report whether the land was vacant (valdio). I made report that it was embraced within the lands belonging to the military post, as the Governor had asked for that information in referring the petition to me. It was not in fact vacant (valdio) as it was occupied by the military works and used for that purpose. It belonged to the Government.

Ques. 15.—In what direction and how far from the Presidio was that land?

Ans.—The Presidio is on the land which was petitioned for in that petition.

Ques. 16.—State, if you know, whether the municipal or other authorities, or the citizens of said Mission, or so called pueblo, or any other pueblo or town, previous to the American occupation of the country, ever exercised any acts of ownership over, or laid claim to any lands whatever, in the present county of San Francisco, as lands of the property of the town; and if the said town, or any other town within the Territory embraced by the present county of San Francisco was ever reputed to be the owner of, or have any right to, any lands whatever; and if yea, explain what lands, and by what right they were held or claimed.

Ans.—The pueblo at the Mission Dolores pretended to own the lands immediately about the Mission which did not belong to any individual, such were recognized as the lands of the pueblo. So far as relates to acts of ownership, I never saw any acts of measurement. The pueblo never made any; I never saw lands measured by surveyors till the Americans came here, nor were any enclosures made by the pueblo as such. I never knew a pueblo in California to enclose its lands. I do not know by what right they claimed the lands, but the pueblo solicited the Governor to establish its settlement (poblacion) at the Mission Dolores, in the pueblo of San Francisco de Asis, and the Governor established as *cabezera* (capital) of the district of the pueblo of San Francisco de Asis at the establishment of Dolores; that is all I know about the right by which they claimed. The court of the Justice of the Peace was there, and the Justice of the Peace gave various lots to individuals to build houses and live on.

Ques. 17.—Did the Justice of the Peace give such lots by order of the Government?

Ans.—He did; of fifty vara lots.

Ques. 18.—Did the Governor himself make grants of lots in the pueblo?

Ans.—He granted lots which were more than fifty varas, as the Justice of the Peace only had authority to give fifty vara lots; when they were larger than fifty varas, the application had to be made to the Governor, who by a marginal order on the petition directed the Justice to give the applicant the lots so petitioned for. The Governor gave orders that the Justice should not grant lots of more than fifty varas each, without application was made to the Governor and received his sanction. I made grants myself as Justice of the Peace here in Yerba Buena, while I was acting in that office at Dolores.

The Justices had the authority to grant lots both here in Yerba Buen and at the Mission, it was all within their jurisdiction.

CROSS-EXAMINED BY ATTORNEYS FOR CLAIMANT.

Ques. 1.—Look at the Document No 2, H. I. T., annexed to Deposition of M. G. Vallejo, taken in this case, and say if the name Francisco Sanchez, therein written is your name, and you are the same person therein referred to as one of the *Junta primaria de los electores* and an election of an Ayuntamiento was made by the said *Junta;* i yea, when and where was the said Ayuntamiento installed?

Ans.—I am the same individual referred to in document as Francisco Sanchez; that is my name. I was member of the *Junta Primaria* referred to, and acted as secretary of the same. That *Junta,* on th first Sunday in December, 1834, elected electors of whom I was one for the purpose of choosing the Ayuntamient was chosen on the third Sunday of the same month. The Ayuntamiento was installed Jan. 1, 1835. These meetings, elections and installations all took place at the Presidio. The oath of office was administered by the Alcalde, Francisco de Haro, by M. G. Vallejo, wh was the military comandante, and the said Alcalde administered th oath to the others.

Ques. 2.—Answer the same questions respecting documents No. 3 annexed to deposition of M. G. Vallejo, taken in this case.

Ans.—In December 1853, the primary Junta chose electors, and the chose an Ayuntamiento as before at the Presidio of San Francisco, an I am the same person also named in this document as secretary, an this is a genuine document. The second Ayuntamiento went int office Jan. 1st, 1836.

Ques. 3.—Where did the next or third election for an Ayuntamient take place?

Ans.—At the same place at the Presidio, and the election of th Primaria Junta of that year, 1836, for the choice of electors for th Ayuntamiento of 1837 also took place at the Presidio.

Ques. 4.—Where did the Ayuntamiento of 1837 hold its sittings?

Ans.—Chiefly through that year they sat at the Presidio, but towards the close of that year they moved to the Mission Dolores.

Ques. 5.—Why was the Ayuntamiento moved to the Mission?

Ans.—As the Governor established the capital (cabezera) of the pa tido or district of San Francisco at the Mission of Dolores, the Ayuntamiento was moved to that place, and because the Presidio bein a military post the pueblo could not be established there.

Ques. 6.—In what year did the Governor make the Mission the *Cabezera* of the partido or district of San Francisco?

Ans.—I do not recollect. The Governor Alvarado is here an knows.

Ques. 7.—How did you know that the Mission was made the capital of the district?

Ans.—I saw the order; it was published and was in the archives.

Ques. 8.—How long after that order was issued did the removal of the Ayuntamiento take place?

Ans.—I do not recollect.

Ques. 9.—Do you recollect whether, in the order of Gov. Alvarado establishing the Mission as the capital of the district of San Francisco, you saw any order, establishing the capital of any other district or partido?

Ans.—There was, in the same order, an order establishing San Juan Bautista as a cabezera of that district. I do not recollect of any other in that order.

Ques. 10.—Look at Document No. 6, annexed to M. G. Vallejo's deposition in this case, and say what locality is referred to in the address on said documents?

Ans.—At the time of the date of this document the Alcalde was at the Presidio, and Don Jose Castro will know what place the address refers to.

Ques. 11.—Who was the constitutional Alcalde of San Francisco de Asis, in 1835?

Ans.—Don Francisco de Haro was.

Ques. 12.—Was said Francisco de Haro a member of the Ayuntamiento which had its sessions at the Presidio in 1835?

Ans.—He was the Alcalde and presided over that Ayuntamiento.

Ques. 13.—Was there any Ayuntamiento at the Mission of San Francisco, in the years 1834, 1835 and 1836?

Ans.—In 1834 there was no Ayuntamiento any where about here, and in 1835 and 1836 it was not at the Mission, but at the Presidio; there was none at the Mission in those years.

Ques. 14.—How many, and what years was there an Ayuntamiento held at the Mission Dolores?

Ans.—In 1838 it held its sessions there, and in 1839 there ceased to be an Ayuntamiento, as the Governor established a Justice of the Peace. There was no Ayuntamiento at the Mission in any other years.

Ques. 15.—Give the names of the Justices of the Peace who succeeded the Ayuntamiento, after it was superseded by the Governor.

Ans.—Don Francisco Guerrero, in May, 1839, I think, entered upon the duties of Justice of the Peace. It seems to me there was a (Suplente,) or 2d Justice, Vicente Maramontes, though I am not certain.

Ques. 16.—Do you remember the names of the Justices of the Peace in 1840?

Ans.—The same Francisco Guerrero continued till 1841. I was Justice of the Peace in 1842 and 1843, and Jesus Noe was my (Segundo,) or second Justice.

Ques. 17.—Who were the Justices of the Peace, after 1843?

Ans.—William Hinckley was Justice in 1844. I do not recollec his (Segundo); in 1845, Juan Nepomoceno Padilla, his second wa Jose de la Cruz Sanchez; said Padilla was a Justice of the Peace there were no Alcaldes at that time, and he was not Alcalde.. Padill was appointed by the Governor, as were all the others. In 1846, Jesu Noe was Justice, till July 9th. I do not recollect his segundo, though I think it was Ridley. FRANCISCO SANCHEZ.

Subscribed and sworn to before me, on this 11th day of May, A. D. 1854.

PETER LOTT,
Commissioner for taking Testimony, &c.

BEFORE COMMISSIONER LOTT.

Jose Castro deposed that he is 45 years of age, and reside in Monterey. In 1835, I was Political Chief of California, as senior membe Territorial Deputation from the year 1836 to 1846. In the last mentioned year, 1846, I was Commandant General of California. Befor 1835, in the year 1834, in October and November, I was senior member (Primer Vocal) of the Territorial Deputation; I was well acquainted with Zamarano, former Secretary of Governor Figueroa, and ver familar with his hand-writing. I was in the same office with him on year, and wrote at the same table. I have often seen him write, hav received many letters from him, and know his hand-writing well. O being asked to look at Doc. marked H. I. T. No. 18, annexed to th deposition of M. G. Vallejo, heretofore taken and filed in this case, an say whether the name "Zamarano" thereon written is his genuin signature, he says, no it is not his signature, the rubrica is mor imperfect than the name is; according to my judgment it is not his The words "es copia conforme," written on this same paper above hi name, is not his hand-writing; I do not know the hand-writing of th body of said document; I can say that Gov. Figueroa never had a clerk in his office, according to the best of my judgment, who wrote a hand-writing such as this. I recollect the session of the Territorial Deputatio of California during the months of October and November, 1834; was first Vocal (President) of the Deputation. On being requeste to examine the said document No. 18, and say whether the subjec matter mentioned therein was brought before the Territorial Deputation, or acted upon by that body between the 24th of October, 1834 and the 4th of November of the same year, he says no such plan a this was ever presented to the Deputation; I have examimed the Documents carefully and understand its contents fully.

The subject matter itself was never presented to, nor acted upon b the said Deputation. On looking at Document No. 3, annexed to th

Deposition of M. G. Vallejo, he says, according to my understanding of this paper, the place therein called "San Francisco de Asis," is the same as the Mission of Dolores. And the plaza mentioned was in the Mission to the west of the church, and also in front of it. There was no other place in the vicinity of the Mission of Dolores, or of the present site of the city of San Francisco, called "San Francisco de Asis," or any other place called the plaza, at the time this paper bears date. On examining Documents Nos. 5, 6, 7, 8, 13, 14, 16, he says, according to my understanding, the name "San Francisco de Asis," and "San Francisco," whenever they occur therein, refers to the place known as the Mission of Dolores.

Examination Continued, April 4, 1854.

On looking at Exhibit No. 1, annexed to Deposition of William A. Richardson, he says his name hereto signed, is his genuine signature. I wrote it with my own hand: I was then acting in the capacity of Political Chief (Gefe Politico).

CROSS-EXAMINED BY MR. PEACHY FOR CLAIMANT.

He says, I do not recollect how often the Territorial Deputation met between the years 1830 and 1840; they met at Monterey; I do not recollect whether there was a meeting of the deputation in 1833; I do not recollect whether there was one in 1835; I recollect that there was a meeting of the deputation in the latter part of the year 1834. On being requested to name the years between 1830 and 1840, when he knows that the Territorial Deputation assembled, he says: I cannot recollect; it might be twenty times, and I will not pretend to say as I cannot remember; between 1830 and 1840 I lived at various points in different parts of the country; I was at Los Angeles, Santa Barbara, San Juan Bautista and Monterey and out of this country in Mexico and in all parts of the country in different commissions from the Government of the country; I was about four months, below this on the bay trapping beaver; I was at Vallejo's head quarters; that was about a league and a half in a westerly direction from this place a little below the old castle near the sea; there was a square out there called the comandancia, where there was a house called the Presidio: when I was there I think it was in 1830, I am not certain; that was the only time that I was at that particular place; I was during that time (between 1830 and 1840) here and at the Mission of Dolores; these are the times that I recollect (of being here and at the Mission Dolores;) there might have been others; I do not recollect how long a time I spent here; it was a few days; I do not recollect the number; I do not recollect how long Vallejo commanded at the Presidio, nor when he took command, nor the year when he left the command, nor who succeeded him, nor whether any one succeeded him. The

Presidio was called the Presidio of our Father San Francisco. (I Presidio de Nuestro Padre San Francisco.) All the Priests called so. I know it from them. I was once a member of the Territori Deputation for 4 years. I think it was 1832, 1834 and 1835. I d not recollect how many sessions were held while I was a member, pe haps there were two sessions of several months; there might hav been more. I do not recollect when those sessions were held. The were held in the latter months of 1834 and the early month of 183 I recollect the session in the year before, but I do not recollect th sittings. I do not remember the number of members of the Territo rial Deputation, Juan B. Alvarado, Carlos Carrillo, Jose Antonio Corre and Pio Pico, and Joaquin Ortega.

On being asked if he was present every day of every session whe the Territorial Deputation sat, he says I was always present; I wa young and healthy at that time; I was always in attendance at th acts (acuerdos) of the Deputation. There might have been a da when I was not there. I, as Vocal, received the Reports of the Committees and the Communications from the Governor. I think I wa first Vocal two years, 1834 and 1835. On being asked if he can recollect any of the business transacted by the Deputation while he wa *first* Vocal, he says I cannot recollect; it would require more time fo me to state exactly what I might recollect; if I could have a day o two I could write what was done. I cannot now recollect any of th proceedings. The Doc. marked Ex. No. 1 was written by Alvarado (he did not say it was *written by* Alvarado, but it is in the hand-writin of Alvarado.)

On being requested by U. S. Law Agent to look at Doc. A, B, C and D, P, L filed in this case, and say whether he recollects any o the proceedings mentioned in Doc. "B," P, L, and is enabled to refres his memory of the proceedings about that time, and the first five page of the Doc. marked B, being read to him at his request, because hi sight was defective, he then answered, I recollect all the proceeding as read to me; I was a member of the Deputation during all that session, when these proceedings were had, and minutes were kept in book of all the proceedings of the Deputation, and that ought to be i the archives.

JOSE CASTRO.

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United States of America, } ss.
State of California. }

San Francisco, May 10, 1854.

This day, personally came before Peter Lott, a Commissioner fo taking testimony to be used before the Board of U. S. Land Commisoners in said State, Charles Brown, a witness on behalf of the United tates, in case No. 280, on the docket of said Board, wherein the city San Francisco is claimant' and the said witness being duly sworn, n oath deposed in the English language, as follows, " to wit :"

The Attorneys for the City, Mr. Peachy and others, are present.

QUESTIONS BY THE U. S. LAW AGENT.

Question 1.—What is your name, age and present residence ?

Answer.—My name is Charles Brown ; my age is 39 years ; my resi- ence Mission Dolores, San Francisco County, California.

Ques. 2.—Where have you resided during the last 20 years ?

Ans.—In the County of San Francisco, California ; I lived about 14 ears on my farm in the red woods, where Col. Jack Hayes now claims, nd the balance of the time at the Mission.

Ques. 3.—Look at the paper marked Doc. No. 3, H. I, T, annexed o the deposition of M. G. Vallejo, heretofore taken in this case, and tate if you know the location of the place therein, called the *Pueblo f San Francisco de Asis,* and the plaza of said pueblo therein men- ioned.

Ans.—I have looked at the papers, and I do know the location of he place called the Pueblo of San Francisco de Asis, it was what is now called the Mission of Dolores and the plaza therein was just in front of the old adobe buildings, and the church about where the cor- ner of Dolores and Centre street is.

Ques. 4.—Was there any other place in the vicinity of the said Mis- sion of San Francisco, or of the present site of the city of San Fran- cisco, called San Francisco de Asis, at any time before the American occupation of the country, or any other place which, at the date of his document, was called the plaza of said pueblo ?

Ans.—The document is dated Nov. 10th, 1835, and at that time there was no other place called the plaza of said pueblo ; nor was there ever, within my knowledge, any other place in the vicinity called San Francisco de Asis.

(Objected to by counsel for city, Gen. Williams, on the ground that it calls for the construction of written instruments, not facts. P. L.)

Ques. 5.—Look at Documents No. 5, 7, 8, 13, 14 and 16, annexed to said deposition of M. G. Vallejo, and say if you know where is the locality of the place referred to therein, the address or otherwise in said documents called San Francisco de Asis and San Francisco?

Ans.—It is Dolores as it is now called, and there was no other place called by those names.

Ques. 6.—State if you know what were reputed to be the boundaries on the side towards the port of San Francisco of the said Mission and so called pueblo of San Francisco ?

Ans.—I always understood the boundary on that side of the Mi sion to be the Mission creek, and running thence straight across t Point Lobos.

Ques. 7.—State if your residence was within the jurisdiction of th authorities of said Mission and so called pueblo, and if you were o were not a voter, and if you were, at what place you voted.

Ans.—I did live within the jurisdiction of the said authorities; was a voter and voted at Dolores and at no other place ; I knew c no elections held anywhere else within said jurisdiction.

Ques. 8.—State by what name the place this side said line of th Mission referred to by you in answer to the sixth interrogatory an lying on the port of San Francisco was known and called previou to the American occupation of the country.

Ans.—It was known as Yerba Buena.

Ques. 9.—State if you know whether the municipal or other au thorities, or the citizens of said Mission or so called pueblo, or an other pueblo or town previous to the date referred to in the last que tion, ever exercised any acts of ownership over, or laid claim to an lands whatever, in the present county of San Francisco, as lands o the property of the town, or if the said town or any other town wit in the territory embraced by the present county of San Francisco wa ever reputed to be the owner of or have any right to any lands wha ever, and if yea, explain what lands and by what right they were hel or claimed.

Ans.—I know of no authority ever exercised over any lands or an claims being made to any land in the county by said pueblo, or an other as owner of such lands, nor by citizens as claiming to hold unde such ownership ; all I know about it is that the place now calle Dolores, was called San Francisco de Asis, and I never heard of thei owning any lands, or claiming to own any as a pueblo. I have live for the last twenty years within what is now the county of San Fra cisco, and within what was the jurisdiction of the Mission Dolores, o San Francisco de Asis.

CROSS-EXAMINED BY ATTORNEYS FOR CLAIMANTS.

Question 1.—Were you a naturalized citizen of Mexico ; if yea, whe did you become such ?

Answer.—I was, and I think I became so naturalized about 1838.

Ques. 2.—Did you ever hold any public office in California ?

Ans.—No.

Ques. 3.—Did you ever live at the presidio ?

Ans.—No I never did.

Ques. 4.—Did you ever live at the Mission Dolores?

Ans.—Yes, I live there now and have lived there this last time fou years.

Ques. 5.—What was your occupation during the twenty years of our residence in California?

Ans.—I sawed lumber and made shingles in the red woods, and have een ranching and had stock.

Ques. 6.—Where did you live in 1833, 1834, 1835, and 1836?

Ans.—In 1833 and part of 1834, I lived between this place and the residio, at a spring called "Ojita Figueroa;" from that to 1835 I was Sonoma and Napa Valley; I was after that a few months at pueblo f San Jose, and from that time to the present in this county; when I eturned to this county from San Jose, I do not recollect exactly where first lived; I was part of the time at the Mission, and here and at my lace in the red woods.

Ques. 7.—Did you ever attend an election of members to the Ayun- amiento?

Ans.—I do not recollect that I ever did; I might have done so.

Ques. 8.—Do you or not own any land in the county of San Fran- isco?

Ans.—I claim to own some.

Ques. 9.—Where is it?

Ans.—I own some on the Sanchez rancho, called Buriburi; that is ll I own. My wife has some at the Lake House, part of the De Haro state, of the Rancho La Laguna de Merced and some lots at the Mis- ion Dolores. I do not know by whom the lots were granted. They ere granted to San Francisco de Haro.

RE-EXAMINED BY U. S. LAW AGENT.

Ques. 1.—Did you know Francisco Guerrero in his life time; if yes, hat was his business and his character, and where did he reside?

Ans.—I knew him well; he lived at the Mission Dolores. He was lways in office, either Alcalde or Sub-prefect or sometoing of that ort. I knew him from about 1835 till he died, all of which time he ved at the Mission Dolores. He went sometimes to his farm on the oast, but always had his home at the Mission.

Ques. 2.—Did he ever keep his office during that time at any other lace than the Mission?

Ans.—He never did at any other place.

Ques. 3.—Are you acquainted with Francisco Sanchez,? how long ave you known him? what office has he held? where has he resided nd where did he keep his office?

Ans.—I know him; he was a long time Alcalde at the Mission Do- ores, and also at one time Alcalde's clerk; he was Captain of the Port of Yerba Buena. I have known him some twenty years or up- ards. He kept his Alcalde's office and his Secretary's office at the ission Dolores.

Ques. 4.—Answer the same questions as to Jose de la Cruz Sanchez?

Ans.—I have known him about the same time that I have know his brother Francisco last named; he was once Alcalde of the Missio and lived and had his office at Dolores; he afterwards moved to hi farm in this county. I do not think that he ever lived at Yerb Buena.

Ques. 5.—Answer the same questions respecting Don Jesus Noe.

Ans.—I have known him since about 1835. He was Alcalde at th Mission Dolores; he lived and had his office in what is now San Francisco, back of Dupont street, back of where the Monumental Engin house now is; I do not recollect the year he was Alcalde; he was th last Alcalde before the war; I think he was elected. I was at tha time at my farm and do not remember.

Ques. 6.—Answer the same questions respecting Francisco de Haro.

Ans.—I knew him; he was my father-in-law; I first knew hi about 1832 or 1833, and till about 1847; he was Alcalde and als Alcalde's Secretary at the Mission Dolores; he lived and kept his office at Mission Dolores.

Ques. 7.—Did the several officers you have named exercise jurisdiction over the country here, irrespective of any pueblo, extending that jurisdiction as far as Contra Costa and the Pulgas Rancho?

Ans.—I know that they exercised jurisdiction here; but I do not know the territorial limit of that jurisdiction; I do not know whether it was limited by any pueblo or town, or not.

CROSS-EXAMINED AGAIN BY ATTORNEYS FOR CLAIMANT.

Ques. 1.—During the time of which you have been speaking, did you take any particular interest in the administration of public affairs at this place, or know much about them?

Ans.—I took but little interest in such matters: I knew only what was publicly known who the officers were, and the like, but took no particular interest or part in such things.

CHARLES BROWN.

Subscribed and sworn to before me, this 10th day of May, A. D., 1854.

PETER LOTT,
Commissioner for taking testimony, &c.

UNITED STATES OF AMERICA,
State of California. } ss.

SAN FRANCISCO, May 11th, 1845.

This day personally came before Peter Lott, a Commissioner for taking testimony to be used before the Board of U. S. Land Commisioners, in said State, Jacob P. Leese, a witness on behalf of the United States in case No. 280 on the docket of said Board, wherein the city f San Francisco is claimant, and the said witness being duly sworn n oath deposed in the English language as follows, to wit:

The attorneys for claimant are present.

QUESTIONS BY U. S. LAW AGENT.

Ques. 1.—What is your name, age, and residence?

Ans.—My name is Jacob P. Leese, my age 45 years, my residence Monterey, California.

Ques. 2.—How long have you lived in California?

Ans.—I have lived here since the year 1833. From 1836 to 1841, lived at Yerba Buena, from that time till 1848, in Sonoma, since that n Monterey. I was frequently visiting Yerba Buena while I lived at Sonoma.

Ques. 3.—Who built and inhabited the first house in Yerba Buena, nd when?

Ans.—I believe I built the first house here and lived in it; that was in 1836.

(Objected to by counsel for claimant on the ground that it calls for construction of written documents and not for facts. P. L.)

Ques. 4.—Look at Document No. 3, annexed to M. G. Vallejo's deposition in this case, and state if you know the location of the place therein called the Pueblo of San Francisco de Asis, and the Plaza of the Pueblo therein mentioned.

Ans.—The locality known as pueblo of San Francisco de Asis, was the Mission of Dolores, and which sometimes was called Dolores. The Plaza referred to in this paper means the Plaza in front of the church at the said Mission.

Ques. 5.—Was there any other place in the vicinity of said Mission, or of the present site of the City of San Francisco, called San Francisco de Asis at any time before the American occupation of the country, or any other place, which at the date of this document was called the Plaza of said Pueblo?

Ans.—There was no other place except the Mission in this vicinity known as San Francisco de Asis, nor any other Plaza known as the Plaza of the said Pueblo before the American occupation of the country.

Ques. 6.—Look at Documents 5, 7, 8, 13, 14 and 16, annexed to M. G. Vallejo's deposition in this case, and state where is the locality of the place referred to in them, in the address or otherwise in said document, called San Francisco de Asis and San Francisco.

Ans.—San Francisco de Asis was the name given to the locality of the Mission Dolores, and, as I understand it, the name in these documents refers to that locality, as also the name San Francisco. The Alcades lived at the Mission.

Ques. 7.—State, if you know, whether the municipal or other authorities, or the citizens of said Mission, or so called Pueblo or town previous to the American occupation of the country, ever exercise any acts of ownership over, or laid claims to any lands whatever i the present county of San Francisco, as land of the property of th town, and if the said town, or any other town within the territory embraced by the present county of San Francisco, was ever reputed t be the owner of, or have any right to any land whatever, and if yea explain what lands, and by what right they were held or claimed.

Ans.—Until the year 1839, I never knew the Pueblo to claim an lands, or exercise acts of ownership over them ; after that, the Puebl of San Francisco de Asis claimed lands in a portion of this place (th present city of San Francisco.) In the year 1839 there was a surve made of this place, (city of San Francisco,) in November, 1839, whic included the streets now known as Montgomery on the east, Pacifi on the north, Dupont on the west, and California street on the south all the land embraced in that survey, the authorities in San Francisc de Asis exercised ownership over, for municipal purposes, for grantin town lots. That is the only land I know of over which the authorities aforesaid exercised jurisdiction, in this place, then known as Yerb Buena. Those lands were claimed by an order which came from th Prefect, directing grants to be made to settlers in this place.

Ques. 8.—Did the claim you speak of in your last answer consis merely in the exercise of the power to grant lots to individuals, communicated by the Departmental Government, within the boundarie which you have mentioned ?

Ans.—That was the substance and intention of the claim—that wa all.

CROSS-EXAMINED BY ATTORNEYS FOR CLAIMANT.

Ques. 1.—Who made the survey of which you have spoken ?

Answer.—Captain Vioget made it.

Ques. 2.—Do you know of any grants of lands having been mad by the municipal authorities of San Francisco, previous to 1839 ; i so, what grants were they ? and by whom or to whom ?

Ans.—I know of no grants being made by said authorities befor 1839. The authorities of San Francisco, before 1839, granted in thi place (Yerba Buena,) to myself, one 100 vara lot, about where th Saint Francis Hotel stands, on the south-west corner of Clay and Dupont streets, and they granted also, before 1839, to William A. Richardson, a lot of the same dimensions, adjoining the grant to me, o the northern side. I do not recollect of any other grants being mad by said authorities before that date. These grants which I speak o were made in pursuance of an order from the Governor (Chico, which I brought myself from him, in June, 1836.

Ques. 3.—Was any price charged for lots which were granted after Vioget's survey in 1839; if yea, what price?

Ans.—Yes, after the survey by Vioget, I myself had a title perfected to a lot, for which the authorities charged me twenty-five dollars; it was a one hundred vara lot; it was a lot now on Montgomery street, between Clay and Sacramento, and was marked No. 1, on the map; I paid that amount to the municipality for the lot; Francisco Guerrero made me a deed for the lot, by order of the Governor, to whom I had applied for such a grant.

Ques. 4.—Was there, at that time, any regular price fixed for these lots; if yea, what was the price, and was it exacted of every one who obtained a lot in the survey?

Ans.—Yes, there was a price fixed, for a fifty vara lot; $6 25 was the price, and every vara over fifty, in front, was 25 cents per vara; to the best of my knowledge, this price was exacted of all who obtained lots.

Ques. 5.—By what authority was that price established?

Ans.—I am not able to say; I believe it was the custom of the country, in all pueblos; it was the custom in Monterey.

Ques. 6.—Who directed the survey to be made by Vioget, in 1839?

Ans.—I do not recollect; I think it was either Alvarado or Castro.

RE-EXAMINED BY U. S. LAW AGENT.

Question 1.—Was the sum which you have referred to as the price of lots, which were granted, called *derechos*.

(Objected to by counsel for claimant as leading the witness. P. L.)

The question withdrawn by the Law Agent after the objection was interposed, and before the question was entirely written, but after it had been spoken in hearing of the witness. P. L.

Ques. 2.—Was the sum which you have referred to as the price of lots, designated by some particular name in Spanish, if yea, what was it?

Ans.—Yes it was so designated; it was called the funds of the municipalidad; municipal fund is the translation.

Ques. 3.—Please mention the Spanish word by which the sum paid for the grant of lots was designated?

Ans.—The term was *Los derechos de la Municipalidad.*

CROSS-EXAMINED AGAIN BY CLAIMANTS COUNSEL.

Question 1.—Do you not claim lands within the limits claimed by the city of San Francisco in this case, and for which you have petitioned this Board for confirmation, if yea, state what lands and under what title you hold them?

Ans.—I claim land in this place, which was a grant to me and Salvador Vallejo, in the Spring of 1839, before the survey by Vioget, of which I have spoken, which is now known as Clarke's Point.

Signed, J. P. LEESE.

Subscribed and sworn to before me on this 11th day of May, A. D., 1854.

(Signed,) PETER LOTT,
Commissioner for taking Testimony, &c.

BEFORE COMMISSIONER LOTT—MAY 15, 1854.

Charles E. Picket deposes that he is a resident of San Francisco County, thirty-five years of age, and has resided in California since July 1846. I lived in Yerba Buena from July 1846 till March 1847. From my inquiries and examinations about July 7, 1846, which were very particular, there was no regularly constituted municipal corporation on the present site of the City of San Francisco at that date. I had a conversation with Francisco Guerrero, and I think I had with M. G. Vallejo, though I am not positive. I think so from the fact that I conversed with most of the ancient Californians upon the subject, and there seemed to be but one opinion. On my return, after an absence of a few weeks, I found that Capt. Montgomery, at the fort, had appointed his second Lieutenant, Mr. Bartlett, Alcalde. Soon after my arrival in town, Mr. Leidesdorff and other citizens, I do not know (I stopped at Leidesdorff House) said they had been trying to get Capt. Montgomery to authorize the new Alcalde to grant lots as the old ones had done under the Mexican Government, but that he had hesitated, believing that he had no authority to do so. They then requested me to see Capt. Montgomery, and gave me some reasons why he ought to give the authority. I saw Capt. Montgomery on the subject, and represented the wishes of the citizens to him. He then stated to me that he could get no positive information as to the authority he or the Alcade had for granting land, and requested me to get all the information I could on the subject and report to him. Mr. Leidesdorff was my interpreter conversing with Jesus Noe, Ex-Alcalde, and with Francisco Guerrero, and also Francisco Sanchez and Jose de la Cruz Sanchez. They all concurred in the opinion that there was no *Pueblo* in existence here. They also stated the usage and custom which had been adopted by the Alcalde here, in granting lands. This all took place here (San Francisco) in September, 1846.

GENERAL VALLEJO'S LETTER.

Sonoma, Nov. 7th, 1843.

Senor Don Guillermo Richardson :—Esteemed Sponsor, (compadre;)
nor Don Manuel Castanares writes to me requesting to inform him
bout the vacant lands existing in the " Yerba Buena," and particularly
the sea-beach ; as Senor Don Manuel seems to be a little jealous of
e extensive grants which Senor Don Manuel Micheltoreña has made
other individuals, as you know Senor Castanares wishes to enjoy
so the same rights that the foreigners do. You know that he has
ld several offices, and that to-day he is the Collector of the Maritime
ustom House, and he wishes also to get something, as all the rest.—
e solicits to obtain a tract of a thousand "varas" long, by two hun-
ed "varas" wide, and besides fifty "varas" in the sea, the whole
ngth to make a wharf.

It seems to me, sponsor, that this Senor works to have the Custom
ouse brought to San Francisco—let us see. You know that always
was my project, that the Custom House should be removed to San
ancisco, and I believe that my friend Castanares knows something,
r he came from Mexico full of the projects of Bandini, Hisar, Par-
es and Aranjo, who, had they not fallen into disfavor, would have
nsummated said removal. However,we shall see how the thing goes.
for my part, don't think that the Custom House may remain in Mon-
rey. Whether the lands be given to foreigners or natives, matters
little, after the object being obtained. But it would be far better
at he should have such land in preference to other strangers as I
me to understand.

I send you also the letter of Don Francisco Sanchez, about the sub-
ct, to whom I have written already as Alcade of the place, to state
hich are the vacant lands of such dimensions as you will see. he indi-
tes to me the boundaries of a devil of a tract. I think that you
ow better of the grants made, so I hope you will have the goodness
give me your opinion, that I may write to Senor Don Manuel Cas-
nares, about his solicitation to water privileges, which he is going
ask the Governor, following the example of Leese, Salvador, and
e Russians, &c. ; also that you may give me an idea about the land,
th a deliniation of the sea-beach, although I think it be a foolishness
ask for since it is worth but little, it is deep bottom, there are so
ge rocks, that Capt. Steel on one or two occasions, got his vessel
uck, while I was on board, and besides you know that at the very
ace there lay the wreck of the Spanish Brig of War, "San Carlos,"
hich was cast away, I think, in 1812.

I believe that your statement about the subject will be of much
eight in favor of Senor Castanares, and will be considered the best
port as may be given, since by your practical knowledge as a resi-

dent of the place, you have been Captain of the Port many years, ar this is of much consideration to the subject in question.

Also, I understand that our friend, the well-known Limantour, wl you will recollect wrecked on "Punta de Reyes," and whom we helpe to save a part of his goods, with thousand troubles, has furnished larg sums to General Micheltorena, and that if he does not intrigue, at lea he endeavors to obtain some grants in that and other places, takin advantage of the poverty and scarcity of the revenue of the Treasu of the Department.

Finally, we should endeavor as a first point in view, to get and brir the Custom House to San Francisco—since from that, it will not on result a good to the country, but to ourselves particularly. I hav sent the exposition made to the Government, printed here officially and this, it seems to me, has opened the eyes of Senor Castanares, wh has no property in Monterey. Besides, you know, that I have man friends in Mexico, and particularly the friendship of the President the Republic, to whom, both privately and officially, I have writte extensively ; and according to my political and financial barometer the Capitol, Senor Virmond, the thing takes a very favorable aspec Senor Castanares has told me in private conversation, that he thoug of establishing a rancho here, and I offered to give him cattle, hors and Indians, in this way calculating upon his friendship, as we sha predispose him in our favor. The General himself is well disposed foster the advancement of the country. I can operate, as you kno so efficaciously that almost I am able to assure you that the thing wi be done.

This companion and friend wishes you prosperity.

(Signed) M. G. VALLEJO.

I, George Fisher, Secretary of the Board of the United States Com missioners, to ascertain and settle private land claims in the State California, certify the foregoing to be a translation of a Spanish doc ment on file in this office, in case No. 548, Jose Y. Limantour, an under my charge and custody, as such Secretary.

Witness my hand this 22nd day of September, 1853.

(Signed) GEORGE FISHER, *Secretary.*

A.

Jose Figueroa, Brigadier General of the Mexican Republic, Commandant General, Inspector, and Gefe Superior Politico of the Territory of Upper California.

The most Excellent Territorial Deputation desirous of supplying to he *pueblos* the funds necessary for works of common utility, has been pleased to accord the following:

Plan of *propios* and *arbitrios* for municipal funds of the Ayuntamientos of the territory of Upper California.

Art. 1.—The *Ayuntamientos* will apply by the ordinary channels, soliciting that to each *pueblo* lands be assigned for *ejidos* and for *propios.*

Art. 2.—The lands of *propios* which may be assigned to each *pueblo* shall be divided into middling sized and small portions, and may be rented, or given out on quit rent (*censo enfiteutico*) at public auction.

The present possessors of lands of *propios* shall pay the annual rent, *censo,*) which according to the discretion of the *Ayuntamientos,* with he previous *informe* of three intelligent men, may be imposed.

Art. 3.—For the concession of a lot to form habitations, the parties nterested shall pay six dollars and two rials for each lot of one hunlrod varas square, and thus progressively or diminutively, shall pay at he rate of two rials per vara front.

Following are 15 articles more, relating to matters not material in his case. The last article, which is the 19th, provides that the sub ect shall be reported to the Supreme Government, which appears t ave been done by the following communication, which is annexed:

E. S.

(EXCELLENT SIR.)

I have the honor to transmit to you, accompanying this, three copi f the *bando,* which contains the plan of *propios* and *arbitrios* for thes municipalities, accorded by the Excellent Deputation of this territory, n the 30th of July last, in compliance with article 19, and in orde hat you may be pleased to bring it (elevate it) to the cognizance he most Excellent President for his supreme resolution, as he may eem just.

God and Liberty, Aug. 6, 1834.

EXCELLENT SENOR,

Minister of Relations.

B

This Document is a copy certified by the U. S. Surveyor Gener for California, from the Journal of the Territorial Deputation, fro the 31st day of October, 1834, to the 3d day of November fo lowing inclusive, when the Deputation adjourned *sine die.* In th proceedinds of the 3d Nov., is contained the resolution, duly adopte which is referred to in Doc. No. 1, annexed to the deposition of M. G Vallejo that " the Gefe Politico shall take the necessary steps to th end that the *Partido* (district) of San Francisco proceed to the election of a Constitutional Ayuntamiento, which must reside in the Presidio of that name, composed of one alcade, two *regidores,* and on *Sindico Procurador,* being regulated throughout in carrying it int effect by the Constitution, and the law of 18th July, 1830 (should b 12th July.)"

In none of the proceedings is any reference had to the subject referred to in Doc. No. 4 and 18, annexed to the deposition of M. G Vallejo. The remainder of the proceedings of the Deputation referre to in Doc. B. have no material connection with this case.

C

This document is an *Expediente* certified by the Surveyor General from the old archives of California remaining in his custody.

It contains:

1.—A petition to the Gefe Politico, dated Ranchos of the North, San Antonio, San Pablo and those adjoining, May 30, 1835. The petitioners represent themselves as the residents of said ranchos of the north, " belonging to the jurisdiction of the port of San Francisco," and represent that they are subjected to great inconveniences, by being subject to that jurisdiction, among which are the perils of the sea and the danger of shipwreck, in their voyage to said port, which, they say, will be at least forty leagues, going and returning. They say, that in the said " Port" there are no lodgings for the accommodation of an Ayuntamiento, with their families, for a whole year, after having brought with them the supplies necessary, during the time of their official employment, and that to serve in offices which they may be called to fill, they will have to abandon their families and private affairs for a whole year, for which reasons, and others not material, they pray to be annexed to the jurisdiction of the authorities of San Jose, deputing for them a person charged with the administration of justice, who will be subject to the Judge of San Jose, as the *cabezera* (capital) as, in those ranchos, the greater part of the citizens reside with their families. It is signed by

Antonio Ma. Peralta,
Joaquin Isidro Castro,
Blas Narvais,
Santiago Olbera,
Fernando Felis,
Antonio Armijo,
Juan Bernal,
Bisente Peralta,
Antonio Igera,
Bartolo Pacheco,
Ignacio Peralta,
Bruno Balencia,
Rafael Felis,
Juan Jose Castro,
Gabriel Castro,
Candelario Balencia,
Jose Peralta,
Joaquin Moraga,
Ramon Torivio,
Jose Duarto,
Francisco Pacheco,
Mariano Castro,
Filipe Briones,
Domingo Peralta,
Julian Vil,
Francisco Soto,
Francisco Armijo.

On the 5th Sept. 1835, the subject having been passed to the Territorial Deputation, pursuant to an order of the *Gefe Politico,* Jose Castro, endorsed in the margin of the petition, they report that they find the application to be "founded in justice, reason and public convenience; but as the subject ought to be treated of with the necessary previous informes," they consider that these ought to be given by the Ayuntamientos of the pueblos of San Jose and San Francisco. They accordingly so resolve, and that the Expediente shall afterwards be returned to them with the *informes.*

Sept. 28th, the Gefe Politico orders the *Expediente* to be passed to those Ayuntamientos accordingly, and when returned with the *informes*, to be accompanied with a list (padron) of the citizens of the pueblo of San Francisco.

Nov. 4th, 1835, the Ayuntamiento of San Jose report in favor of the application, observing that the petitioners had previously pertained to that jurisdiction.

Dec. 20, 1835, in a report dated at the "Port of San Francisco," "the Ayuntamiento of San Francisco, says that the reasons set forth by the petitioners why they ought not to belong to this jurisdiction are frivolous in their conception," and after many observations irrelevant to this case, advert to the fact that the petitioners have represented "that in the *Presidio* there are no lodgings where they can live for a year when they may be called to discharge some office in the Ayuntamiento, the which is not true (allowing us so to speak) and they deviate from the truth therein, and frankness which they ought to observe before the authority which they are addressing (as they likewise do in putting names as subscribed which really do not exist, and which might be mentioned) for it is evident and an established fact that the military Commandant of the Presidio furnished houses to the functionaries of the present Ayuntamiento as soon as it was installed."

"In conclusion," they say, "the land or coast which embraces the petitioners, has formerly pertained to the jurisdiction of the Presidio; for besides forming with that of the Port itself the bay of San Francisco, the Rancho of Castros which is in front of the Presidio (a little more northerly) is scarcely two leagues distant by sea, and that of the Peraltas, two leagues, and a little more to the west; which circumstances were without doubt the *data* upon which the most Excellent Deputation proceeded, when in the latter part of the year 1834 (counting upon those citizens) resolved that the formation of the Ayuntamiento should be proceeded to (making report to the Supreme Government) and the Commandant General and *Gefe Politico* at that time D. Jose Figueroa (may he rest in peace!) acting from the same reasons as the corporation (the Deputation) proceeded to carry their resolution into effect, thus giving orders to the Military Commandant of San Francisco; and over and above the circumstances aforesaid, likewise concurs, that when said deceased Figueroa delineated (al demarcar) (although provisionally) the limits of the jurisdiction of San Francisco as appears from his official note remaining in these archives, he likewise included that part of the land and property (terreno y bienes.") This is signed by Francisco De Haro and Francisco Sanchez Secretary, and with that the *Expediente* ends.

D.

A message from the Governor delivered to the Departmental Junta on the 16th day of February 1840, in which the condition of the country is treated of elaborately. The following extracts contain all that is in any way material in this case.

"*Ejidos*—No one of the said towns (of the department) with the exception of Monterey, have marked out to them the *Ejidos* and lands of *propios* which ought to be fixed for each one of the municipalities, in order that they may know their *fundo legal*, for which reason the Government on making grants immediately about the towns, has done it provisionally, in anticipation of the regulation of this matter. The proper *informes* have been repeatedly required. Your Excellency (the Junta) in view of all and in use of the powers which are conceded to you in the first part of article 45, of the said law, (of 20 March, 1837,) and with the concurrence of the Government, will regulate as may be convenient."

AGRICULTURE.—Under this head the message states that during the few years past a considerable quantity of land has been granted both o natives and foreigners, but that "it is to be noted in respect to the eater part of the said grants, that they possess the character of legal concessions, if it be considered that they exist within the ten ttoral leagues which the law regulating the subject of 18 Aug., 1824, xpresses." It states in continuation that the different *Gefes Politicos* nd provincial deputations considering the narrowness of the country ying altogether upon the coast, and that to oblige the farmers to establish themselves in the interior, would be to expose their lives and roperty to the savage tribes, were obliged to accede to such concessions. "But it is to be observed likewise that upon this subject no application has been directed to the Supreme Government, which has or its object the legalizing of them, nor am I aware that this subject as been brought to its cognizance. Your Excellency (the Junta) to hose attention I commend this business for the benefit of agriculture, will take the appropriate initiative, directing to the Supreme Government the due representation by which the lands of said proprietors ay be secured in a legitimate and permanent mode."

E

Is a copy certified by the County Recorder of a certain book in the Spanish language, which appears by the certificate of Washington A. Bartlett, the first American Alcalde, dated Aug., 1846, to have been anded over to him by *Don Jose de Jesus Noe*, the last Mexican Justice f the Peace, and Bartlett's immediate predecessor, "as containing the nly record of the grants of lots in said town of Yerba-buena."

This book purports to contain a record of all the grants made in the ueblo or Mission of San Francisco and the place (*paraje*) called Yerba-buena at any time prior to the time of its delivery to Mr. Bartlett. The dates commence in 1839, and end June 6, 1846.

It has three headings as follows:

1. "Book in which are evidenced the possessions of *solares* in the oint (*punto*) of Yerba-buena in virtue of the orders (*lo despuesto*) of he Departmental Government."

2. "Are evidenced those granted in the establishment of Dolores in ursuance of the authority applied for (*lo pedido*) by the Prefecture f the District of the government of the Department, of which (fact) have cognizance, as appears from the official note which is found on age two."

3. Gives a "formula showing the mode in which possessions of *olares* to form habitations have been given to the citizens (*vecinos*) f the jurisdiction of San Francisco de Asis."

The official note referred to, which appears to have been written by F. Castro, acting *ad interim*, and dated 1841, states that he had received from the Secretary of Government an offici communication, dated 16th April, 1841, reciting that when the Pr fect, Don Jose Castro made a visit to the north, he bore with him i structions from the government on various subjects, and among othe it was ordered that *solares* might be granted to individuals in the e tablishment of *Dolores*, but they must not exceed fifty varas, whic disposition of the government was now renewed in consequence of t official communication of the Prefecture, dated the 6th of the san month, which his Excellency, (the Governor,) had seen.

The grants entered in the book of a date anterior to this commun cation, are generally of 100 varas, but those of a subsequent date, bot at the Mission, and at Yerba Buena, are of fifty varas only, except tho made by the Governor.

In this book are recorded fifty-five grants, in all, at both points. (these, ten appear to have been made either directly by the Governo or in pursuance of his *special* order. Five were made in complian with a special decree of the Prefect made in each individual cas The grants by the Governor and the Prefect are indiscriminately (one hundred vara, and fifty vara lots. Two of the Governor's grant at Yerba Buena, appear to have been made April 22, 1846. The r maining grants appear to have been made in virtue of the authority give by the Departmental Government, referred to in the heading of t book, and to which allusion is sometimes made in the subsequent e tries, and sometimes not. One of the grants made by the Govern at Yerba Buena, is in the form of a license to erect some sort of m chinery, and the decree of the Governor contains these words:—" being understood that as soon as the said *sola* shall be disoccupied b the machine referred to, it shall remain to the benefit of the nation f the uses convenient." The word town or *pueblo* is nowhere used i the book, but a plan is several times referred to. The place in whic the grants this side of Mission Creek are made, is designated as th *paraje* (locality), or *punto* (point) of *Yerba Buena*.

STATEMENT

LANDS SOLD ON JUDGMENTS ACCORDING TO THE EVIDENCE INTRODUCED IN THIS CASE BEFORE THE U. S. BOARD OF LAND COMMISSIONERS.

The property within and adjoining this city which has been sold at
eriff's sales on executions against the city, is as follows:

On the 8th of July, 1851, 2 fifty vara lots (and 5 wharves, all the
arves of the city then built, or nearly, except Commercial or Long
harf.)

On the 19th of September following, 40 one hundred (or 160 fifty,)
1 55 fifty vara lots, making in all 215 fifty vara lots, were sold, all
which were held either under Alcade grants, or by the Commission-
of the Funded Debt of the city.

On the 14th of June, A. D. 1851, the Sheriff sold 30 entire blocks
1 7 one hundred vara lots, besides 102 water lots.

On the 26th November, 1851, the Sheriff sold 24 entire blocks,
nprising about 300 fifty vara lots, and the entire number brought
y $1275, as appears on the official books of the Sheriff.

On the 30th January, A. D. 1852, the Sheriff sold 16 fifty vara lots,
hundred vara lots, and 15 entire blocks, and a piece of land near
nston street and Mission Creek, containing 5 blocks making in all
out 400 fifty vara lots, and also at the same sale, three large tracts
and extending in a belt two miles wide, entirely around the sur-
yed limits of the city except on the water, which leaving out so
ch of it as is covered with water, may be described as follows: Be-
ning at the intersection of Larkin street with the bay, and running
nce along the natural high water mark of the bay, to the distance
two miles in a straight line, thence south on a line parallel to the
e of Larkin street, about four and a half miles, thence east to the
d water mark to the south of the city, thence along said water mark
a point two miles south of Clay street, thence to the junction of
lsom and Corbett streets, thence along Corbett to the line of Larkin
eet, and along Larkin street to the place of beginning. Only a
fling portion of the water property around the city which has been
d under the same executions and judgments is included in the
ove description.

OTE.—It is believed that the whole amount for which the foregoing property was sold, will be con-
rably less than $10,000.

POINTS ON BEHALF OF THE UNITED STAT

1. There is no evidence of the establishment of a Municipal poration at any time within the present limits of the City of San I cisco. The Ayuntamiento elected in 1834–5, was for the *Partid* San Francisco, which embraced all Contra Costa, Sonoma, San Ra and on this side of the Bay, the whole of the present County of Francisco. It was a change of the former Military Government, w the Commandant of the Presidio had exercised, into a civil Gov ment for the same district.

2. The head-quarters of the civil authorities elected to super the Military Commandant, though first established at the Presidi want of some other suitable place at that time, were afterward moved to the Mission of San Francisco, commonly called Dol which thus became the *Cabezera* (Capital) of the *Partido*, and co ued to be so till the time of the American occupation of the cou There the Ayuntamiento held their sessions so long as that bo tinued. There the elections were held, and there all the muni officers resided, kept their public offices, and the archives of the government of the Partido with the exception of Capt. Hinc ley Jesus Noe.

3. The place called indiscriminately, the Pueblo of San Fran and San Francisco de Asis is the secularized Mission of San Fran de Asis or Dolores, and no other place was ever known by that previous to the American occupation. No part of the country side of Mission Creek was ever considered as included in it. O last two points, all the depositions, documents and evidence co without any exception.

4. No limits were ever assigned to the so called pueblo of Francisco or any other pueblo in the present county of San Fran by any competent authority, nor by any authority whatever.

5. The document No. 18 annexed to the deposition of M. G. lejo, though incompetent as evidence, insufficient to prove the

to be established by it, and wholly irrelevant to the matter controversy if it did prove it, is abundantly shown to be a forgery, the deposition of Alvarado, Hartnell, Richardson and Castro. Be-es this, in point of law, the Gefe Politico and deputation had no wer to fix limits to any *pueblo.*

6. There is not only no evidence of the establishment of a munici-l corporation anywhere in the present county of San Francisco, but e fact is that no authority existed in California competent to create e.

7. But if the existence of the municipal corporation had been arly made out with its limits defined, and established by competent thority, that is, admitting all that the claimant has even *attempted* prove, it would not tend to support the claim in this case; it would ly show the *competency* of the corporation to *acquire* and to *hold* operty. The claimant has not attempted to prove any *grant* or pre-nded that any was ever made in point of fact.

8. By the laws of Mexico, towns of every class, though capable of quiring property, have none by virtue of their establishment as such, l or personal, none but what they acquire in the same mode and h the same legal requisites as individuals with this one superadded those necessary in the case of individuals, that towns to receive or d landed property must have the special license of government.

). By the laws of Spain and Mexico all municipal corporations oy just such rights, privileges and exemptions, as may be specially nted to them in their charters or other special legislative acts, and to property, they enjoy such as they can get from the lawful owner the usual legal mode, with the license of government superadded.

10. The demarkation of limits to towns, *Partidos* or provinces, nothing to do with property, but all property (by the laws of xico) which may be embraced within such limits when established, l and personal, remains unaffected in the possession of its several prietors, whether the proprietor be an individual, a corporation, or sovereign.

11. Although municipal corporations are competent to acquire pro-ty with the license of Government, no power ever existed in Cali-nia competent to grant the smallest portion of the public domain, the property of such corporations, for any purpose whatever.

.2. The laws of the Mexican Republic, which must be the only e in the territories, and the departments which previously existed y as territories, make no provision for granting or reserving public ds to municipal corporations, but the whole system of town lands reservations was abolished, and therefore no power but the general ngress was ever competent to make such grants in California, since independence of Mexico was established.

3. Under the laws then, as they existed in California, prior to July 46, no city or pueblo could hold land without express grant, and if

the property in the soil had not in fact at that time passed from th sovereign to some person or corporation to whose rights the presen claimant has succeded, no confirmation can be had in this case, unles the 14th section of the act of 1851 is construed to operate as a transfer to the present city of San Francisco.

14. That section instead of *granting*, directs how city lots hel under grants to individuals from corporations to which lands may hav been granted, shall be presented to the Board, thus showing that thi Board is confined to questions connected with actual grants.

15. In this case, as no grant has been proved, the claimant mus rely on the presumption raised by said section 14.

16. To make that presumption available, the claimant must brin itself, by the proofs, within the provisions of the act. In the first plac it must be shown that the corporation has granted lots to individuals an the claim to those lots may then be presented by the corporation, an the clause making the existence of a city on the 7th of July, 1846 *prima facie* evidence of a grant to such corporation, only applies t cases where the coporation has presented those individual claims, an for the benefit of those claimants. The city has failed to present an grants on behalf of private individuals, and is not therefore entitled t the benefit of any presumptions raised by the statute. On the other hand she claims adversely the whole land within certain limits, showing numerous adverse claimants, when the evident intetion of the statute was to enable a city (or individual) where the claims must otherwise be numerous, to present each sub claim in one petition, and thus obviate the necessity of making proofs in a large number of cases, of one original grant.

17. But if a grant is to be presumed under the statute, can you presume more than the bare existence? Would you not be compelled to prove the *loss* and the *contents*, as in other cases. The statute only provides for a presumption of the existence of a grant. How then will the terms be fixed? who is presumed the grantor and who the grantee? What is the presumed date of the grant? What are the limits to be assigned under the direction of presumptions? Will you establish a point and make the limit equidistant from it in all its parts thus forming a circle; or will you form a square or cther figure and fix the lines arbitrarily?

The necessity of having these questions answered in the proofs, show that the contents of the grant must be proved; otherwise, any attempt to carry the doctrine of presumption, so far as to fix the terms, would be, in fact, an arbitrary exercise of power wholly at variance with all rules of proceeding in courts.

18. Again, who shall have the benefit of the presumption, the city or those private parties who hold adverse? The 14th section applies to individuals as well as to corporations, and those claimants who are named in the petition, together with Limantour, are entitled to the

same presumption, with this circumstance in their favor. You would not be compelled to PRESUME the TERMS of their claims, because they are filed in each case and proved. Besides this, the presumption thus allowed to operate equally in favor of various conflicting claims, contradicts and destroys itself.

If we are correct in the foregoing propositions, the claimant must be held to strict proof of every essential fact, the most essential of which are not in evidence, and therefore the claim must fail.

19. But if there were rights in a former pueblo to all the lands now claimed, in what corporation did it exist? This is essential, so that we can ascertain whether the present claimant has SUCCEEDED to the same rights.

Was the Presidio of San Francisco the owner? That was a military establishment owned by the government, and the government could grant, or not, in its discretion. Was it the pueblo of San Francisco de Asis? No part of that was included within the limits of the city of San Francisco, as first established. Was it the port of Yerba Buena? That was never a separate municipal organization from the Mission Dolores; most of the officers who exercised jurisdiction over Yerba Buena were residents of Mission Dolores; and all the elections were held entirely outside of the first established limits of the city of San Francisco. If then no city was the owner, the claimant could not succeed to any proprietary rights as successor of a Mexican pueblo. The city of San Francisco dates its legal existence, April 15th, 1850. The act creating the city and defining its limits, did not purport to adopt any part of a former organization, and no SUCCESSION to any rights or privileges of a pre-existing pueblo is claimed therein, taking a NAME and location peculiarly its own. There is not in any of the evidence proof of succession to any former rights of property, and no proof of the existence of the CITY of San Francisco on the 7th of July, 1846, and consequently, the claim must be rejected.

The authorities to prove the foregoing proposition, will be produced orally to the Board, and submitted during the argument.

J. H. McKUNE,
Law Agent.
HORACE HAWES,
Of Counsel.

ERRATA.

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n page 8, in answer to interrogatory 17 for are "*not* all dead" (5th line) read *now* all dead.

ame page, in 4th interrogatory by U. S. Law Agent, for "*Potrero*" read *tido*, and in the answer thereto, for "*I* did not," read, *it* did not.

n same page, at the continuation of the examination, insert the date (Feb 15.)

xhibit No. 4, referred to in the deposition of M. G. Vallejo, is not inserted, it g merely a copy ef Exhibit No. 18.

he testimony of H. W. Halleck is taken from the minutes of the claimant's coun- the official record of it having been mislaid.

6

BRIEF OF ARGUMENT

MADE BY

HORACE HAWES,

ON BEHALF OF UNITED STATES,

BEFORE

U. S. Board of Land Commissioners

FOR CALIFORNIA, NO. 280,

AT THE REQUEST OF THE U. S. LAW AGENT.

CITY OF SAN FRANCISCO VS. THE UNITED STATES.

DELIVERED MAY 29, 30, 31 AND JUNE 2, 1854.

SAN FRANCISCO:
TIMES AND TRANSCRIPT STEAM PRESSES.
1854.

BRIEF OF ARGUMENT.

Although it will be perceived from a subsequent part of my argument, that all the facts attempted to be established by the claimant, are wholly immaterial and irrelevant to the subject in controversy, inasmuch as no proof has been offered of any grant of lands to the town of which the present city of San Francisco is alleged to be the successor and heir ; yet I propose to refer briefly to such as have been regarded as important, and

1. Was an Ayuntamiento elected for the *Partido* of San Francisco pursuant to the resolution of the Territorial deputation passed Nov. 3, 1834, and communicated to Gen Vallejo by Governor Figueroa in the letter dated Nov. 4, (Exhibit No. 1 to Vallejo's Dep.)

The election of members for such Ayuntamiento undoubtedly took place, and if that is material, I will add that it was held at the Presidio, although we have no documentary evidence of the fact, the documents marked Exhibits 2 and 3, referring only to the choice of electors by whom the members were to be chosen. This Ayuntamiento was installed by the Military Commandant of the Presidio, who had to that time exercised the civil functions with which the newly constituted body was to be charged, because there was no other authority existing that could install them.

2. What was the territorial jurisdiction of this Ayuntamiento?

It will at once be seen that it must be co-extensive with the *Partido* for the only authority for the creation of an Ayuntamiento is found in the resolution of the Deputation referred to in the said Exhibit No. 1, which provides that the *Partido* of San Francisco, comprehending by the concurrent testimony of all the witnesses on both sides, a large extent of country on the other side of the Bay of San Francisco, and on this side the whole of the Peninsula as far as San Francisquito Creek, shall proceed to elect a Constitutional Ayuntamiento. And when the election was held, pursuant to this order, says Francisco Sanchez, (p. 42 and 43) the whole *Pueblo* (people,) of San Francisco that is of the *Partido* of that name, came from their several abodes in Contra Costa, Sonoma, San Rafael and other places, "sparing no exertion to do so, as they were anxious to get rid of the military authority." And so, from this time on, the civil authority of the *Partido* was joyfully taken in hand by the *Pueblo* (people) of San Francisco who were to exercise it through the constitutional functionaries, elected by them. Not only did the voters for the Ayuntamiento come from Contra Costa and other places, distant from the Presidio and Port, but a majority of the individuals chosen for electors and of those selected to fill the various offices at different periods, resided either on the other side of the bay or in the Mission of San Francisco, or in some of the ranchos distant from the Presidio and Port, as may be seen from the depositions of Brown, Sanchez, Richardson and others as well as by reference to document C, in which are set forth the names of 27 persons residing in Contra Costa, who in 1835 wanted to be exempted from the *Partido* of San Francisco, on account of the inconveniences that would result to them from being obliged to serve on the Ayuntamiento which at that date was required to hold its sessions at the Presidio.

3. How long did this Ayuntamiento continue to hold its sessions at the Presidio? There can be no question that it was removed to the Mission and never sat at the Presidio after the year 1837. So says Sanchez (p. 42) who was Secretary of that body, and in this he is supported by all the testimony in the case. After the year 1838 until 1846, only two persons, Piña and Soto, who were soldiers with families, continued to reside at the Presidio. The Mission from that period to the war was the residence of the local authorities, and the place where all elections were held.

4. Where is the locality called the *Pueblo* of San Francisco and San Francisco de Asis? That it is the Mission of Dolores, is a fact fully established by the testimony of Richardson, (p. 27), Alvarado, (p. 39), Francisco Sanchez, (p. 42), Jose Castro, (p. 48), Charles Brown, (p. 50)), Jacob P. Leese, (p. 54), and *there is no witness or document that says the contrary.*

5. Were any limits for a town ever established by competent authority, or to be more definite, was the line generally denominated the Vallejo line so established, and for that purpose? I waive the question whether Gen. Vallejo did mark out either on the ground, or on paper, or mentally, the line referred to, as no one will pretend that *he* alone had the power to establish it. I waive also, for the present, the question whether the Territorial Deputation had power to establish it, or to approve the establishment of it. I inquire only if they did so. Neither Gen. Vallejo nor any other witness testifies that they did, nor would parol proof of that fact be admissible, without first laying some foundation for it. But even if it could be proved by parol, no such proof has been offered. Neither has the record of the proceedings of this Deputation been offered, which is the only competent evidence, unless such record has been lost. But we know that the record is not lost, for the Government has produced it, and it contains no act such as the claimant pretends was adopted by the Deputation. If the resolution was adopted and not recorded, it could have no legal effect whatever, because a deliberative body, such as the Territorial Deputation, can not act by parol. Their acts have no legal existence till recorded at least. But even if the act of the Deputation could subsist in parol, that is, could be valid without ever having been recorded, we have the highest evidence possible in such a case, that the act was not adopted, nor even considered, namely the deposition of the presiding member, (p. 47.) who, as first *Vocal* received all communications from the Governor, and distributed to the various committees the business on which they were to report respectively. If the claimant's counsel had entertained any doubt of the truth or accuracy of José Castro, why did they not call one of the six other members whose names appear in the journals of that session, some of whom are yet living in the State, and one of whom, at least, has been in this very room, repeatedly, since Castro's deposition was taken? It must be taken as true then, beyond all controversy, that the Deputation never did act upon the subject at all. The record of their proceedings says so, and the presiding member confirms it by his oath. Was there some other record or journal in which this act might have been entered? That is not pretended. The Zamarano document (No. 18,) which has so clearly been proved to be a forgery, was got up by unskillful hands. It does not purport to certify an act of the Deputation. It certifies only that a certain paper is a copy of a certain other paper, which other paper certifies that the Territorial Deputation had passed a certain act, which act must necessarily be matter of record. I am at a loss to perceive under what rule of evidence such a document can be admitted, or have any legal weight though its genuineness were unquestioned.

If the original letter of Figueroa, of which this forged document purports to be a copy, were now produced and its genuineness admitted, it could not certainly be admitted as the best evidence to prove the act of the Deputation, for the record (or a certified copy of it,) of the proceedings and acts of that body would be better, and the proper officer, under the former government. to certify such record, was the person having the custody of the archives of the government—the Secretary—and if such certificate or certified copy had been issued and afterwards lost, it would not be competent to offer a copy of such certificate or certified copy, but recourse must be had to the record again, or else its existence and loss must be proved. The act referred to in Document No. 18, purports to be an act of the Government, conjointly with the Territorial Deputation, and even if the original document, of which it is alleged to be a copy, namely, the original letter of Figneroa, were competent evidence of such act, as being a certificate of what was done, and recorded as all acts of government and the Deputation must have been to have any validity; still, the loss of the letter must be supplied, not by a copy or proof of its contents, but by having recourse again to the original record, or proving its existence and loss.

But if it were admissible to give evidence of a copy or of the contents of the letter of Figueroa, no sufficient evidence has been given. The only witness who speaks on that point is Gen. Vallejo, and he does not say that either exhibit No. 4, nor exhibit No. 18, was copied by him from the original, nor that he ever compared either of them with the original. It cannot, therefore, be considered as a copy, or admissible as a copy, under the rules of evidence applicable to the case. No evidence has been offered of the *contents* of the letter of Figueroa, nor does Gen. Vallejo testify that he has any recollection of such contents, distinct from the said exhibits. The said exhibits are offered as copies, and as, up to this time, they are not proved to be such, by any competent evidence, they must be rejected, and not considered as part of the evidence in the case. What evidence is there, then, of the establishment of the Vallejo line? There is none whatever. Counsel for claimant have argued as if Gen. Vallejo had testified to the *fact* that the government with the Deputation had established or approved that line as the limit on one side of some pueblo. He has testified to no such thing, nor would parol proof of that fact be admissible. Again, there is no evidence whatever that any genuine document or record of any kind, relating to the alleged act of government, ever existed in the archives of government. No witness says so. No genuine document says so. The *existence* must be proved clearly before the loss can be proved, and both must be clearly established before any inferior evidence can be admitted. More than this, it is proved beyond all doubt that the document referred to by Gen. Vallejo was not one referring to the demarcation of any *Pueblo*. Gen. Vallejo says he put that document, whatever it was, in the archives of the pueblo. The keeper of the archives, as may be seen by reference to the second and third depositions of Francisco Sanchez, and the law on the subject, was the Secretary of the Ayuntamieuto. Every communication and every document, after being seen by the Alcalde, was passed into his hands to be archived. Sanchez was Secretary from the organization of the Ayuntamiento till that body ceased to exist. He swears that he saw no document containing or referring to the demarcation of limits to any *Pueblo*. The only limits ever designated, as he says, were those of the *Partido* which he describes. He was also the Justice of the Peace in 1842 and 1843, and as such had still the custody of the archives. He was also commandant of the Presidio from 1837 to 1840 and from 1845 to the American occupation. Surely, no one could know better than he whether such a document ever existed. In addition to this, it is in proof that every person who has had the custody of the said archives from the time the Ayuntamiento was first organized in 1835 to the American occupation in 1846, except Hinckley and Guerrero, is now living, and all of them have been almost daily in attendance at this Commission. Why has not some one of them been called to prove the existence and the loss of the alleged document. Gen. Vallejo says he put it in the archives of the *Pueblo*. Is it not most clear that if he did put it there, he has forgotten its contents, as he very well may have done after the lapse of twenty years; for that no document expressing the limits to any *Pueblo* ever existed in those archives, seems to me to be beyond all doubt. The deposition of Capt. Halleck as to what he saw in the Alcalde's office, in 1849, is of no legal weight, as he does not describe any document, and, if he had done so, being entirely unacquainted with the hand-writing of Figueroa, never having even seen the man, he could give no legal evidence as to the genuineness of any document purporting to be from him. All that he says respecting the archives of the Departmental Government is equally irrelevant to the question, whether any record had *existed* on the subject of boundaries: for *neither he, nor any other man, living or dead, pretends to have ever seen or heard of the existence of any such record in any place.*

Gen. Williams, on Saturday last, paid a merited compliment to the character of my friend, Gen. Vallejo, as I am informed. I thank him for it, and I am sorry my health did not permit me to be present to hear it. It is the only sentiment in his whole argument, I believe, which was ever expressed before, at least by any gentleman of his abilities.

It seems to me, therefore, that the conclusion is inevitable without impeaching anybody's veracity, founded upon all the facts and documents, that no limits were ever ever fixed by any act of the Territorial Government as limits of a town in this present county, unless it should be those marked out by Captain Richardson in 1835, and described on the map annexed to his deposition in this case including the land at Yerba Buena from California or Pine street to North Beach, and extending west about as far as Stockton street. That this survey was made, the map formed and remitted to the Governor, and the plan approved by him provisionally in his official note, dated Oct. 20, 1835, (p. 31), is proved by Richardson's deposition, and the original document on file in this case, the genuineness of which are acknowledged by Governor Castro in his deposition (p. 48), and is not brought in doubt by any evidence in the case.

Having thus adverted as briefly as possible to some of the leading facts, I will proceed to consider the points of law, observing in the outset that the claim appears to me to be not only invalid, but destitute of any foundation. In this respect, it differs from all the adjudicated cases. It is, perhaps, the first time in the history of judicial proceedings, in which a tribunal has been gravely asked to pronounce in favor of a claimant who offers no proof of any right or title to the thing claimed. Truly the parties interested in the confirmation of this claim must "live by faith alone."

§ 1. The first point to be considered in the argument of this case is, by what law is the claim to be determined? It will at once be admitted that it must be governed by the Mexican laws, under the sanction of which the rights of the claimant, such as they may be, must have had their origin.

§ 2. The Independence of Mexico, so far as respects the effect of Spanish legislation, is reckoned from the 23d day of Sept., 1821, when she was denied a representation in the *Cortes*. Spanish laws of a date subsequent to this, are not recognized as having any operation in the Republic, but all those of a prior date which were not repugnant to the new political system continued to have the same force after, which they had up to the time of the Independence. It may may seem superfluous to refer to authorities in support of a doctrine familiar to those having the slightest knowledge of Mexican jurisprudence. To elucidate it, however, I will adopt the language used in the introduction to the "*Colleccion de decretos y Ordenes de las Cortes de España que se reputan vigentes en la Republica de los Estados Unidos Mejicanos.*"

§ 3. "The Independence of Mexico having been happily realized by the occupation of its Capital on the 27th Sept. 1821, and the overthrow of the Vice-royal Government, although the bonds of dependency on Spain remained forever broken, the laws which regulated the rights and duties of this new society could not nor ought to remain without vigor, since it not being possible to replace them but in the transcourse of time, and by the authorities competent, the sudden abolition of them all would have been the establishment of a state of anarchy at a time when order was most needed.

"Thus it is that with the exception of those laws which conflicted directly with the the plan of Iguala, and the new order of things which it created, all the rest which had emanated from the kings of Spain, and the sovereign authority which to that time had been recognised, were acknowledged and respected. Suits were decided by them; justice was administered in conformity therewith, and by ther tenor the Mexicans regulated their social life. Hence, the Spanish Codes, to which others entirely national have not yet been substituted, are sought after with eagerness by judges, professors, and even private citizens, as in these they encounter the standard of their actions, the guaranty of their respective rights, and the rule of their judicial proceedings."

"Notwithstanding that Mexico is independent of Spain," says the author of the Febrero Mejicano, "she is yet governed by the codes of her ancient metropolis, because (as say the History of the Law, new ed. of D. Juan Sala), circumstances which it is not necessary to mention, have prevented the substitution of others entirely national, to those which in many parts are repugnant to the character of a free and independent nation, and much more to the system of Government which has been adopted.

"They subsist, however, in all other parts, and are now the rules of the actions among the Mexicans, who find in them the sum of their rights when not determined by national laws. For this reason is indispensable the study of the Spanish Codes, from which are are deduced nearly all the doctrines of this work." (1 Feb., Mej. 28.)

The same doctrine is authoritatively declared in a "Consulta" of the Council of State, addressed to the Supreme Government of Mexico, Sept. 20, 1838, on the question referred to them whether the laws of the old States, now Departments, ought to be considered as remaining in force after the establishment of the consolidated Central Government.

§ 5. "To resolve this question," says the Council, "we will make some observations which perhaps may conduct us to a correct conclusion. It ought principally to be noted that *all* those laws are in force, which not being directly repugnant to the system which rules, are not expressly abrogated by some posterior disposition, this rule having its application even with respect to those laws which were dictated in very remote epochs, and under the different forms of government which the nation has had. Thus it is that the tribunals and other authorities, daily resolve the different subjects of their cognizance according to the decrees of the Spanish Cortes, the laws of the *Partidas* and the *Recopilacion* provided that these dispositions do not partake more or less of the form of government under which they were dictated," and concludes with the opinion that the laws of the old States ought to be regarded as remaining in force, which was adopted by the Executive and communicated to the Governors of the Departments, in order that it should be observed as a *general rule*, (*Coleccion de leyes y Decretos importantes, etc.*, 1838–9, p. 130.) The foregoing proposition and the authorities cited, refer only to those rules and dispositions established by the Supreme Power, the *Legislator*, and intended to have the force and effect of *laws*.

The orders and dispositions of other departments and functionaries not invested with the legislative authority, cease with the Government that issued them.

§ 6. It is a fixed rule of interpretation in Mexican Jurisprudence that, the former law must not be deemed changed by the posterior any farther than it is so expressly declared. The reason is because the correction of the laws being *odious*, it is avoided whenever possible by construction, always endeavoring to reconcile them and not admitting the change without necessity. (1 Feb. mej. p. 17.)

§ 7. In determining any question in Mexican Jurisprudence, the codes are to be consulted in the following order after the constitution and laws of the Republic and of the particular State in which the question may arise.

1. The latest dispositions of the Spanish Government made applicable to New Spain and *communicated* in the usual form though not inserted in the recapilation of the laws of the Indies, and having respect to those of latest date in all cases of conflict.
2. The laws of the *Recapilacion* of the Indies, and if they should be found conflicting, giving effect to those of latest date.
3. The *Nueva Recapilacion* including the *autos acordados* of the Supreme Council, and observing always the dates in order to resolve any doubt arising from real or apparent conflict. (1 Feb. Mej. 49. Refers 1 1 and 2, T. 1. Lib. 2, R. I.)
4. The Laws of the *Fuero Real* and the *Fuero Juzgo*.
5. The Statutes and Ordinances of each city, provided they have been confirmed by the Royal Council, (or the Legislative authority), and be not opposed to the principles of religion or any written law.
6. The Laws of the *Siete Partidas*.
7. If after consulting all the Codes, Constitutions and Statutes mentioned, an express law cannot be found applicable to the particular case which has occurred, it must be decided by some other law for similar cases which can be accommodated to it by parity of reason. (*Alvarez Derecho Real y de Indies, v.* 1, *p.* 58–60.)

§ 8. The *Novisima Recapilacion* not having been at any time ordered to be observed in New Spain, nor communicated in the usual mode, nor having been adopted by the Legislative authority since the establishment of the Republic, is not regarded as an authoritative code in Mexico, and consequently to determine the force and effect which any law found in it ought to have, it must be referred to its origin. (1 Feb. Mej. 39.)

§ 9. The distinction which exists between an executive regulation and a *law* must also be constantly borne in mind, for the executive can only provide for the *execution* of the law, and consequently a regulation or decree of the Government conflicting with any existing *law*, whether an act of the Mexican Congress, or a law found in any of the codes referred to, is void ; and as observes *Lares* in his *Derecho Administrativó, p.* 19 : " neither the judical nor administrative tribunals are under any obligation to obey illegal *reglamentos*," and the council of Government in the *consulta* already referred to, expressly say, that regarding the laws of the old States as *Vigentes* (remaining in force) in all things not directly repugnant to the ruling system, it is of no consequence that the Supreme Government may have dictated otherwise for its dispositions must never be placed above the laws.

§ 10. The proposition which I now propose to make clear by reference to various laws and authorities that will be cited in the proper place, is : That towns in Mexico as in all Spanish countries, (and I might add in all countries in the world) enjoy the rights, privileges and franchises which have been specially conceded by the sovereign authority, and although by virtue of some general laws, the mere fact of their *corporate* existence would entitle them to some *political* rights, such as to have a local Government, constituted in the manner which these laws prescribe, yet in respect to property, real or personal, they can claim only such as has been expressly granted to them, or which they have acquired by purchase, or by some other legitimate title, in the same manner and subject to the same laws as individuals ; that is to say, that the formation of Ayuntamientos, the election of Alcaldes, or other officers, establishment of limits to towns, *Partidos*, districts, or provinces, has nothing to do with *property*, but all property, real as well as personal, which may be included within such limits, when established, belongs to the same proprietor that it did before—some to individuals, some to various corporations perhaps, as churches, hospitals, monasteries, and some to the sovereign.

And when the law guarantees to the towns their privileges, offices, uses, customs and franchises, (as in L. 1, 2, 3, 4 and 5, T. 2, Lib. 7 R. and L 3, T. 5, Lib. 3, R.), rights, revenues and *propiós*, (as in L. 1, 2, T. 5, Lib. 7, R.), *Aldeas*. fortresses &c., (as in L. 6, T. 5, Lib. 7, R.), it speaks of those things which have been expressly granted to them, or acquired by some legitimate title, and is only in affirmance of the principles of natural justice, equally applicable to the rights of individuals and corporations ; and when it gives a solemn pledge to preserve to the towns and cities in Spain, their *terminos comunes or valdios Ejidos*, *montes* and *pastos*, (as in L. 1 and 2, T. 7, Lib. 7, R.), and that the sovereign will not sell any part of the *terminos publicos* or *valdiós*, (as in L. 8 and 10, T. 5, Lib. 7, and in L. 11), which refers to the solemn contract between the King and people known as the " *Condicion de Milliones*," it has exclusive reference to the vacant lands in Spain, of which the citizens of the towns had enjoyed the use in common for many centuries, and proposes the perpetuation of a system of policy in reference to the public lands which was completely abandoned in 1813.

In order to understand this subject properly, we must have reference to the dates of the laws cited, and the actual state of the country and its legislation at the time. The laws of the Recopilation already referred to, were promulgated, as we have seen by their dates, at various periods, from the year 1325 to 1609.

The towns and cities were not by any means equal in respect to their political rights and franchises, nor in respect to the lands and property which they enjoyed, nor were they all subject to the King as their *immediate* Lord.

To show the position in which they stood in these respects, and how they acquired their respective privileges and franchises, I will translate some passages from a work entitled " *Leyes Fundamentales de la Monarquia Española*," by *R. P. Fr. Maguin Ferrer*. " As a result of the invasion of the Moors, the dominions of the King of Spain had been reduced to the mountains of *Asturias*. It was proposed to reconquer the country, and the chiefs of the people who had united with D. Pelayo, continued in the meantime acquiring lands, and the king gave them the government and the property in the lands of certain of the *Pueblos*, while he himself remained owner of the lands of other districts *(Comarcas.)*

"By degrees, as this system created by circumstance, acquired consistence, so that no one perceived that it had acquired the character of a *system*, the principle became firmly established, that the king was to be considered in two characters, the one as particular Lord of the *Pueblos* and lands conquered, which continued as his own private patrimony ; and in this respect he was on a footing of equality with the other lords in regard to their respective estates. The other as universal lord *(Señor)* of the kingdom, or that which is the same thing, as the Sovereign, and in this character he commanded the subordinate lords and governed the kingdom" (p. 146, vol. 1.). "The right of property is founded in natural law, and absolute sovereignty being itself subordinate and subject to this right, it follows that it cannot dispose of the right of property.

Let us take the idea of property as it was understood in those times in relation to the subject of which we are treating. When the king gave lands to the lords *(Señores)*, it was considered that he gave them not only the dominion and property in the fields *(campos)*, the vineyards, the woods, the houses, &c., but that he gave them likewise the right of *Government* and *Jurisdiction* over the persons who inhabited the lands, so that the particular lords were the proprietary governors and judges of their respective dominions, administering them conformably to the general laws of the Kingdom (ib. 147).

§ 12. Thus passed three centuries, the king governing the monarchy as universal lord, and *customarily* administering the affairs of the *Pueblos* of his own patrimony as their particular lord. But in the year 1050 or 1012 perhaps, Alonzo V., desiring to give more regularity and solemnity to the politeal and judicial administration, called together the Council or *Cortes*, and promulgated the special laws called the *fuero* (law or franchise) of *Leon*, among others of a general nature promulgated for the whole kingdom. This is the most ancient *fuero* (franchise) which can properly be so called, and in it are comprehended some thirty laws reputed as municipal, in as much as their observance was restricted to the city of *Leon* and its *Termino* or *Alfoz* (the district over which the municipal government extended its jurisdiction."

From that time the municipal system took its origin, without its being then perceived, however, nor its effects being foreseen, and which in time came to represent one of the three estates of the Realm.

Whether it was because the kings understood the beneficial results that would follow from giving to each one of the cities and *villas* a written *fuero* (code) by which it should be governed ; whether it was necessity that compelled them to concede these *fueros* in order to attract people to come and settle the cities that remained deserted, or the desire to distinguish the *pueblos* that belonged to their particular dominion from those which pertained to other lords; it is certain that thenceforward, date the *fueros* granted successively to *Najera* by *D. Sancho* the elder of *Navarra*, to *Sepúlvedda*, *Logroño* and *Sahagun* by *D. Alonzo VI*, to *Jaca* by *D. Sancho Ramirez*, to *Toledo* by *D. Alonzo VII*, and other cities and *villas* by the said kings or their successors, who either granted them new *fueros* (franchises) or gave them some one of the primitive, as, for example, *D. Alonzo VI*, who rebuilt the city of *Oviedo*, giving it the *fuero* of *Sahagun*. Following the example of the kings, various of the particular lords likewise gave *fueros* to their respective *Pueblos*, *although it was with the express consent or by the command of the Sovereign, for the lords of the Pueblos had no legislative authority*. Thus it was that the Bishop of *Palencia*, D. Ramon II, gave *fueros* to that city and its council with the consent, will and concession of our Lord *Alonzo*, King of *Castile*. The master of *Santiago Pedro Fernandez* to the citizens of *Castrotoraf*, by the good pleasure of the King *Ferdinand*, and by his command ; and to those of *Ucles*, by the will and order of the King *Alonzo* and his wife Eleonor, and when it happened that any lord gave *fueros* without the license and consent of the king having preceded, he confirmed them afterwards, if he thought proper, as he did in the case of the *fuero* of *Madrigal* granted to the Bishop of Burgos, D. Pedro, saying that he gives and grants to the citizens of Madrigal the *fueros* (franchises) which were given them by D. Pedro, Bishop of *Burgos*.*

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* No corporation of any class can be formed without express royal license and authority.—

§ 13. The franchises (*fueros*) given by the King to the cities and *villas* produced without at first perceiving it, the innovation that each city and each *villa* came to be a particular *Señor* which governed its citizens and administered the affairs of its *Termino* or *Alfoz* (district,) in the same manner that the Lords (*Señores*) governed their respective lands, with the only difference, besides the accidental ones which existed in their charters (*cartas forales*), that the dominions and authority of the Lords was vested in an individual, while that of the cities and villas was vested in a corporation (*cuerpo*) called a *consejo*, the members of which, as I have already said, and shall have occasion to repeat a thousand times, were heads of the principal proprietary families. And I will observe here that for the same reason that the king ceased not to be the absolute Sovereign in the estates of the particular Lords, because the rights, the dominion, and the jurisdiction of these was a legitimate property which belonged to them, so, neither did he cease to be so of the cities and *villas*, because the dominion and the jurisdiction of the latter over their respective citizens was a property which the king had given them in their charters (*cartas Pueblas o forales.*) With this explanation, which is the extract of all the histories, and all the authentic documents of the first four centuries of the restoration, will be discovered the capital error of some statesmen, who, giving an aspect and sense contrary to facts and writings, have pictured Spain sometimes under the odious point of view, as being governed by the Feudal system, and sometimes under the enchanting view of a system almost Republican.

The system, or rather the fundamental law was always the same. that is to say, that the lords governed their particular estates with perpetual right, dominion and jurisdiction, but subject to the dependence and pre-eminent dominion of the Monarch. Only there was a period in which all the estates which formed the patrimony of the King, were governed by the latter as particular lord, with appeal to himself as sovereign; and there was another period in which the King as sovereign made donations by means of charters (*Cartas Pueblas y forales*) to the cities and *villas* of all *or a part* of the rights and properties which he held as particular lord, in the same manner that in the first ages of the restoration he made these donations to private persons, who for this cause were denominated *Señores.* That is to say that in the second epoch in like manner as the estates of the particular lords were under the immediate dependence of a single individual who transmitted his rights to his successors, so the lands that were of the royal Seigniory, were under the immediate dependence of many individuals who formed the Council (*Consejo*), and who as a body corporate (*cuerpo*), was the perpetual possessor, the individuals changing conformable to the laws.

§ 14. I have already said that when the King gave *fueros* (franchises) to *Leon*, he sowed, without its having occurred to any body, the seed which in time was to vary fundamentally the entire administration of the affairs of the kingdom. The Monarch had obligated himself in the charters (*Cartas Pueblas y forales*) not to impose any tributes but such as were therein expressed. The expenses of the war becomes every day more exhorbitant, and were in inverse proportion to the royal revenues, for the sovereign had to sustain this war, not only for the purpose of adding new territory to what had already been conquered, but to avoid the loss of what he yet possessed; and the day arrived in which, being totally destitute of the necessary resources to continue it, and seeing the flourishing state of his cities, especially those which were removed from the frontiers of the Moors, and being unable to exact new tributes according to the franchises (*fueros*) which he had granted and confirmed with an oath, he saw himself reduced to the necessity to petition them to grant him the resources required. To this end he called together in the *Cortes* the *Procuradores* of the different cities; he unfolded to them the necessities of the kingdom to which his revenues were inadequate, and treated with them respecting the means which they could contribute in order to escape from the exigency equally prejudicial to the sovereign and the *Pueblos.*

It was natural that the cities should accede not only for the benefit that would result to themselves, but because of the new honors which the Sovereign did them in giving them a voice and a vote in the *Cortes.*

(*Don, Instituciones del Derecho Publico General de España.* V. 1, p. 273.) In addition to the charters referred to, see extracts given by *Henao*, of the charters of Bermeo, *Bilboa* and other towns in Spain.—(*Averiguaciones, &c., pps.* 139, 90, 204, 247.)

§ 15. Besides the rights of the particular lords, and of the cities and *villas* which pertained to the king (that is, which were of the seignory royal) there were the *behetrias*, which were the *Pueblos* formed by foreign emigrants whom the Sovereign had invited to settle desert districts *(Comarcas)*, giving them the right to elect their respective Lord, who was to continue for life."

§ 16. There was also a fourth species of seigniory recognized in Spain during the period referred to by the author just cited, called *abodengo*, which was a portion of the seigniory and jurisdiction royal in certain *Pueblos* which the kings ceded to churches, monasteries and prelates. (See for a more complete explanation of this subject, note 2 to tit. 8 lib. 1, *Fuero Viejo de Castilla* by *Asso & Manuel*, and the "*Adiciones*" to the preliminary discourse to this code by *Pedro José Pidal.*)

§ 17. But the rights, privileges, exemptions and property of all the *Pueblos*, whether seignorial, *Realengos*, *behetrias* or *abadengos*, depended in each case, upon the express concessions made by the Sovereign, or by his command, or with his subsequent approval and confirmation. in their respective town charters or *cartas Pueblas*, and which privileges and exemptions were not uniformly the same in all the towns, but varied according to the terms of their charters as before stated by the author cited.

Neither were all the *Pueblos* or towns—of which there were many classes and grades—bodies corporate; but many, indeed the greater number of them at the date of the laws of the *Recopilacion* before referred to, were destitute of any jurisdiction or independent rights, privileges, exemptions or property, being subject to the jurisdiction, control and government of the corporate *villa* or city within whose *termino*, *alfoz* or *demarcacion* they were situated.

D. Vicente Vizcaino Perez, advocate of the Royal Council, in the celebrated work entitled "*Compendio del drecho Publico y Comun de España*," speaking of the formation of towns in general, after observing that in Spain they cannot be formed without royal license, says, "These unions of inhabitants have different names; some are called *Aldeas*, *Lugares*, *Arrabales*, *Pagos*, *Villas*, *Ciudades ;* and all these *Poblaciones* take their title conformably to the *Privilegios de Poblacion*, which the Sovereign concedes to each one; (v. 1, p. 331;) and the same author, speaking of the *Villa*, which, *per se*, possesses jurisdiction, honor, district and right of patronage, lays it down as an incontestible principle, that "The King or Sovereign Prince, alone has authority to grant privileges, (*privilegios*) or titles of *villas* or to constitute any *Lugar* such, and no other can do it, though he be owner (*dueño*) of the Territory."

§ 18. These charters, privileges, exemptions and royal concessions of every name and nature, after being first signed with the royal hand of the Sovereign himself, were to be next recorded word for word, and then sealed by the Chancellor, for which purpose the Notary of the Kingdoms of Castile and Leon, who held the keys of the arc or chest in which the great seal was kept, were to present it to that high functionary (L. 1, 9, t. 15, Lib. 2, R.), and by the laws of Spain and the Indies this registry was essential; the act or concession not only being *incomplete*, but expressly declared to be null and void without it. (L. 4 and 7, T. 4, Lib. 2, R. I.; L. 2, T. 5, Lib. 3, N. R.)

§ 19. We accordingly find specified in detail, in L. 3, T. 8. Lib. 2, O. R., which is L. 10, T. 15, Lib. 2, R. the fees to be paid to the *Chancilleria* for sealing each of the various charters, privileges, grants, &c.

"Firstly, when we command to give our charter *(carta)* with new franchises *(de fuero nuevo)* to any *villa* there shall be paid for the seal 600 *maravedis*."

"For the charter (*carta*) in which we command to make new proof and give them hereditaments of *termino poblado* (a settled district) there shall be paid for the seal, 300 *maravedis*, and if the *termino* be not *poblado* (settled) there shall be paid 120 *maravedis*."

"If we give to any city or *villa* a great *termino poblado*, it shall pay for the seal 600 *maravedis*, and if it be *termino yermo*, (a desert district) there shall be paid for the seal, 300 *maravedis*."

"And if the *termino* which we may give to any city or *villa*, be as large and valuable as some others that may be *poblado*, they shall pay for the seal to the charter, *(carta)* 600 *maravedis*, and if it be *aldea*, 300 *maravedis*."

"If we exempt any city or *villa* from tax or toll, there shall be paid for the seal to the *carta* for each of these, 600 *maravedis*, and if it be *aldea*, 300 *maravedis*."

"But if we grant such exemptions to a *villa* and district *(tierra)* one fee shall be paid for the *villa* and another for the district. If the *aldea* exercises jurisdiction *per se*, it shall pay for the said *carta* 300 *maravedis*."

"If we shall exempt any *lugar* from the jurisdiction of another city, or *villa* or *Merindad* and give jurisdiction *per se* there shall be paid for said charter 600 *maravedis*."

"If we shall grant to any city, *villa* or *lugar feria* (fair or right to hold one) it shall pay therefor, 200 *maravedis*, and if it be *feria* or *ferias*, *francas*, (in which goods are allowed to be sold free of duty) there shall be paid for the seal for one fair in the year, 1000 *maravedis*, and for two fairs in the year, 2000 *maravedis*."

"If we shall grant to any city, *villa* or *lugar mercado* (the right to hold a public market,) there shall be paid for the seal to the *carta* 200 *maravedis*, and for a free market, 2000 *maravedis*."

The fees to be paid for confirmations and for grants made to individuals of cities, *villas*, *aldeas*, *lugares*, castles, fortresses, offices, titles, and other things belonging to the crown or perogative royal and which could only be granted by the Sovereign Power are also minutely specified.

§ 20. We see therefore, that the laws of the Recopilation of Castile (§ 10) so frequently cited in our courts, recognizing certain rights, privileges, exemptions and property in towns, refer to such as had been conferred by special and formal acts of the Legislative Power, and prove this, and this only, that the sacred right of property, founded in the law of nature itself, was respected by the Sovereign, whether vested in individuals or corporations. But to cite these laws for the purpose of establishing the fact that a town is the owner of any specified or defined tract of land, store, apothecary's shop, rural estate, or other property, would be no less absurd, than to cite in support of some private individual land claims, L 7, T 13, Lib. 4, and L 6 and 10, T 10, Lib. 5, of the same Recopolation, to establish the fact that the claimant had acquired a valid title to the property described in his petition, because these laws contain guaranties equally ample in favor of the private property of individuals.

§ 21. The following language of D. Francisco Antonio De Elizondo one of the most eminent of Spanish Jurists in his "*Practica Universal Forense*" (v. 5, p. 226,) is but a repetition, in more direct, concise and unequivocal terms of the proposition, with which I have set out in my argument, and therefore, if that celebrated author, who was a member of the royal council, in which, subjects affecting the rights and property of towns were daily discussed, may be supposed to have understood them, at least, as well as any of us, it will not be necessary to add any thing further on this point.

"*No hay cosa alguna diputada por derecho para pertenencia de los pueblos mas que aquella, que ò por privilegio de los principes, Costumbre, ò disposicion de los hombres entre si les està concedido.*" *

There is nothing designated by law as belonging to towns, other than that which by royal privilege, custom or contract between man and man, may have been granted to them.

§ 22. It will be observed that I am not *now* speaking of "*terminos comunes*." or of *solares valdios* destined for *repartimiento*, distribution to actual settlers in towns. To avoid repetition, I shall reserve my observations and authorities with reference to this class of *public lands*, until I come to refer to the laws of the Indies and Mexico, regulating the colonization and settlement, the distribution of lands, and the formation of towns.

But I am speaking of the vested corporate rights, the *property* of towns which the laws guaranty to them, and protects in the same manner as the rights and property of individuals, and which they acquire by the same modes, and subject to the same legal rules, requisites and restrictions, with this only difference, that towns being reputed as minors, and under the perpetual tutilage of government, can neither purchase nor alienate without its special license, *(Derecho Administrativo*, p. 121, 194–95, *Teatro de Legislacion*, V. 5, p. 136.)

§ 23. Let us refer now again to L 2, T 5, Lib. 7, R, which has been as often misunderstood and perverted as it has been cited in our courts.

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* To the same effect is Greg, Lopez on L. 9, T. 28, P. 3, see post § 51.

"Our will and pleasure is to preserve to our cities, *villas* and *lugares*, their rights, revenues, and *propios* and not to make any grant of anything thereof: Wherefore we command that the grant or grants, which of them or any part thereof, we may make to any person whatever, be not valid,." (A. D. 1325.)

Whether the term *Derechos* in this connection, signifies *rights*, as I have translated, or certain imposts, which, by virtue of an express concession of the Sovereign some towns were permitted to levy on articles of consumption, is immaterial; for all the rights which they could claim must appear in the documents by which they were acquired, or in the general guaranties of the Common Law extending alike to individuals and corporations.

What were their revenues, (*rentas*,) and *propios* (property)? For these also, they must show the documents,—the express grant (see ante § 21) or title. But in what did these revenues and *propios* consist? What particular things belonged or appertained to the *rentas* and *propios* of the towns? Not the *Solares, Valdios*, for in towns of Spain, which were more populous and more flourishing in the age of the Roman Emperors, than at the present day a settler or squatter would have looked in vain for vacant *solares* in the fourteenth century; Some of them had even then been so long established, that the time and circumstances of their foundation were lost in the obscurity of remote and fabulous ages.

§ 24. But the *solares* in newly founded towns in the depopulated parts of Spain, as well as in the New World, were intended for alienation, for *repartimiento* or distribution among actual settlers.

"Let the *solares* be distributed by lot to the *pobladores*, continuing from those which correspond to the *plaza mayor*, and let the rest remain for us to make grant (*merced*) thereof to those who shall afterwards come to settle, or whatever our pleasure may be. (L. 11, T. 7, Lib. 4, R. I.; see also T. 17, Lib. 7, N. R. *De los despoblados y su repoblacion.*) But "our will and pleasure is to preserve to our cities, villas and *Lugares*, their *revenues* and *propios*, and not to make any grant of anything thereof," &c. Neither could the towns themselves, nor the municipal authorities at any period of time, either in Spain, or the Indies, or in the Mexican Republic, grant or alienate any property belonging to their *propios* or *rentas* without precedent license from the Government, such license not being presumed by any lapse of time short of one hundred years. (Ante § 22, *Elizondo practica Forense Universal, v. 5, p.* 233. 1 *Feb. mej.* 305, *Law of March* 20, 1837, *Art.* 9.*) Neither can the said towns or their authorities encumber them in any manner (ib.) nor are they subject to embargo, seizure or sale by any judicial process. (*Delos' Jurisprudence Generale*, v. 3, p. 133. *Dictionnaire de Droit Normand, title municipatite.*) The *Salares valdios*, or town lots which remained vacant after the distribution made to the first settlers, were not things belonging to the *rentas* or *propios* of the towns, but were intended to be alienated in full property in favor of those who should afterwards come to settle.

§ 25. But "the *propios*" says *Febrero*, "is that species of property, which by *some title* pertains to the commonalty of each *Pueblo*, and the revenues whereof are dedicated to the preservation of the civil State, and municipal establishment of the councils, comprehending likewise under this name all those things declared to be such in virtue of any legal dispositions; *arbitrios* are certain duties, or taxes imposed by the supreme authority upon articles of consumption and commercial effects in those *pueblos* which have no *propios*, or in which they are so inconsiderable, that they are insufficient to meet the necessities of the municipality."

These are the revenues (*rentas*) of the towns. L. 1, T. 5, Lib. 5, *Nueva. Recopilacion*, which is L. 2, T. 16, Lib. 7, of the *Novisima*, provides: "Forasmuch as it is our will and pleasure that the cities, *villas* and *lugares* be relievedin (respect to) their *propios*, we ordain and command that the *tiendas* (shops) and *boticas*, (apothecary stores) *alhondigas* (public granaries) and *lonjas* (exchanges) and *suelos* (sites for stalls or shops) which are in their *plazas* and markets, and which yield rent, or might be rented, and *which were appropriated* to the *propios* of the said cities, *villas* and *lugares*, and likewise the *offices* which they have, which are to be provided for and filled in the said cities, *villas* and *lugares*, and which yield them revenues thereby, (that is, by the sale of them being vendible,) which have been occupied or intruded upon by some persons unjustly, or with power which they hold in the said cities, *villas* and *lugares*, and pay no tribute or rent for the said *suelos;* that they be immediately restored to the said cities, *villas* and *lugares*, and likewise the said *offices*, and if any *cartas* (royal order) and grants of the things aforesaid shall have been given by kings, our progenitors, or by us, let them go for naught, and be obeyed and not fulfilled; and our judiciary, for not fulfilling them, shall incur no penalty, although they may contain any derogatory clauses whatever (1433.)

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* "In cases of *necessity* or for motives of public convenience, they," (the Governors) "may, with the previous consent of the Departmental Junta, grant license to the Ayuntamientos or authorities charged with the administration of the funds (*bienes*) of *propios* and *arbitrios* to alienate some part of said property, and any cession, donation or contract whatsoever made without this requisite, shall be null and void."

(*To obey and not fulfill* is the observance of certain formalities in token of obedience and submission to superior authority, without actually carrying into effect what is commanded.)

§ 26. The revenues and *propios* in different cities and towns in Spain and Spanish America, consist in a great variety of productive property acquired at different periods and in different modes.—Lots leased out on ground rent,—rural estates, stands and tables (or rather sites for them) rented out on the Plazas, markets,—revenues arising from the supply of water for irrigations and family use by means of aqueducts, places and stalls in the *portales* around the plazas or public squares and in certain streets; offices rented out to Notaries and others in the *Cabildo* (City Hall or Town House,) dues collected for anchorage in some sea-ports, and many other things differing in each place, and depending always upon some title or express concessison. An account rendered of the *propios* of the city of Havana and of the city of Sontiago de Cuba for the year 1830 and 1837, which will be found in a work entitled *Biblioteca de Legislacion Ultramarina* (v. 5, p. 215) will illustrate this remark.

In the regulation on the subject of *propios* and *arbitrios* formed for the city of Mexico in 1771, by José De Galvez, Visitor General of New Spain in pursuance of the King's command, it is declared in article 8, "among other revenues ought to be placed first in order that which is denominated of *propios*, and it consists of the shops and stalls of commerce, houses and appurtenances situate in the streets and lanes of Monterilla and S. Bernardo, in various annuities perpetual and redeemable, the pension paid by the contractors for the supply of meat, rent of tables in the slaughter house, the office of sealer of weights and measures of this capital, (which was vendible) and the towns of the arch-bishoprick, and the income from the posts, and tables of the *plaza mayor*, the product whereof are destined to the payment of salaries, public works, charges, festivals, and generally the expenses of the Ayuntamiento." (*Manuel de providencias, economicas,—Politicas, para uso de los habitantes del Distrito Federal, by Rodriguez, p.* 173) The revenue arising from the stands rented out on the plaza mayor is declared to belong to the *propios* by virtue of an express royol concession (Art. 12) and so that arising from duties levied on wine, brandy, vinegar and other liquors, (ib. Art. 21) as well as all the rest. By a Royal *Cedula* of 30th Dec. 1694 the Ayuntamiento was authorized to grant out lots on enfiteutic rent and apply the revenues thence arising to their *propios.*

§ 27. Some cities, *villas* and *lugares* of the Indies, had concessions from the crown for a limited time of the fines payable to the Royal Exchequer, which might be incurred within their jurisdiction to be applied to their *propios*, as may be seen by reference to L. 9, T. 13, lib. 4, R. I.* By L. 1 of the same title and book, (of 1523,) it is also provided that, "The Viceroys and Governors, who may be thereunto empowered (*que tuvieren facultad*) shall assign to each *villa* and *lugar* which may be newly founded and settled, the land and lots (*solares*) which may be necessary and can be given to it without prejudice to third persons for *propios*, and make report to us of what has been assigned and given to each, in order that we order the same to be confirmed," (A. D. 1525). The Viceroys and Governors, not all—or any of them indifferently, but such as may have *aathority* from the king, the Legislative Power shall assign to each *new* town, not those already founded, but those which shall be newly settled, for the *propios* of the place, and consequently to be reserved from sale or distribution, the land and lots which may be necessary for that purpose, and make report thereof to us, not grant them, but advise us, so that we may grant them, or which is the same thing, order the designation made to be confirmed, by which act, the *title* would pass, qualified and limited, however, as in all such cases.

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* By the law of 20 March, 1837, Art's 5, 65, 112, 113, 172, the fines imposed by the Governors, Prefects, Sub-Prefects and Alcaldes are to be applied to the *propios* of the place where the fined person resides.

§ 28. In the division of the tract of land or *termino y territorio* which by *ordinanza* 88 and 89 *de poblaciones*, or L. 6, T. 5, lib. 4, R. I., was to be given to the *empresario* who should undertake to found a *villa* by contract, a quantity of land is to be reserved for *propios* equal to that embraced by the *solares ejido* and *dehesa.* "Let there be taken out first what may be necessary for the *solares* of the *pueblo*, and a competent extent for *ejido* and *dehesa* sufficient to pasture abundantly the cattle, which by ordinance the citizens are to have, *and as much more for the propios of the place.*" (*Ordinanza* 90, L. 7, T. 7, lib. 4, R. I.) All this was regulated by express contract entered into with the Viceroy, *audiencia*, or some person duly authorized by the king, drawn up with great formality in numerous chapters and articles, and which contract was the law that governed the particular case. (*Ordinanza* 87, L. 25, T. 3, lib. 4, R. I.) The lands to be reserved for *propios* were distinct from the *solares*, *ejido* and *dehesa* which were to be taken out of the tract before the lands for *propios* were assigned, and the later were to be equal in quantity to all three of the former together. It is also provided by *ordinanza* 130 *de poblaciones* which is L. 14, T. 7, lib. 4, R. I., as follows:

"Having designated a sufficient quantity of land for *ejido* of the town (*poblacion*), and its growth in conformity with what is provided (in the preceding ordinances,) *let those who have authority* to make the discovery and new settlement designate *dehesa*, which must bound with the *ejidos*, in which to pasture the working oxen and horses, and cattle for the slaughter, and the ordinary number of other cattle which the settlers are required by ordinance to have, and a good deal more which shall be *propios* of the Council," (the proper lands, or property of the Council,) &c. In art. 4, T. 14, of the royal instruction for settlements in Upper California of 24th October, 1781, it is provided that, "the *solares*, which may be granted to new settlers are to be designated by the *government* in the localities (*sitios*,) and of an extent corresponding to that of the land where the new *pueblos* may be established, in such mode that there shall remain formed *plazas* and streets conformable to what is provided by the laws of the kingdom, and in conformity therewith there shall be designated *ejidos* sufficient for the *pueblo* and *dehesa*, with tillable lands suitable for propios," &c.

§ 28½. We see, therefore, that the *propios* and *revenues* of towns consist of a great variety of things acquired by express grant, and that the lands belonging to the *propios* are entirely distinct from the lots laid out for settlement and private occupancy, as well as from every other class of lands, which may be within the limits and jurisdiction of towns. They are the lands granted, designated, described and located for that specific purpose, without which location, boundaries or description, there can of course be no valid grant.

§ 29. We have already seen that by the laws of Spain, not only is it the exclusive prerogative of the king (or since 1812 of the *Cortes*) to grant the title of *villa* to any place, and to designate the *termino* or demarcation of its jurisdiction, but that all the rights, privileges, property and exemptions which it can claim, must be derived from the same source. The same principle is declared in the law of 1627, which is L. 6, T. 8, lib. 4, R. I.

"We ordain that any viceroys, *audiencias*, governors, or other ministers of the Indies, however superior in authority, do not for any cause, or reason whatsoever, confer titles of cities, or *villas* upon any *pueblo* or *lugar* either of Spaniards or Indians, nor exempt them from the jurisdiction of their principal *cabeceras*, with admonition that it will be matter for accusation in the account to be taken of their official conduct, for this *merced* (favor) and faculty must be petitioned for in our Council of the Indies, and we declare void those titles, which in contravention of this law shall be conferred upon any *pueblo* or *lugar* whatsoever; and in respect to the *new towns and settlements* (nuevas poblaciones y fundaciones) let the dispositions (of the law) be observed."

This law is sixty-four years later in date than L. 2, T. 7, lib. 4, R. I., and must be considered as modifying it, if any real conflict exists between them.

§ 30. We accordingly find that when it was proposed by the inhabitants of the *pueblo of Manzanillo* in Cuba, to establish local authorities at that place, erecting themselves into a separate municipality, the *expediente* formed for that purpose had to be passed to the Council of the Indies in order to obtain the royal sanction; and as the title which was granted will illustrate several matters which we have to consider. I beg your indulgence while I read it in English:

"Don Ferdinando VII, by the grace of God, king, &c. In a letter of the 14th May of the year 1830, my Governor, Captain General of the Island of Cuba, reported to me the *expediente* formed at the instance D. Sebastian Romagoza, D. Pedro Olive and D. Joaquin Clavelle, citizens of the new town called Port Royal of the Manzanillo in the said Island, with the intent that there should be granted to it the title of city and *villa*, independent of that of Bayamo, (founded in 1515,) with the right to have a local government sub-delegate of the royal *Hacienda*, Ayuntamiento and Public Notary, manifesting with that view its state of civilization, numerous inhabitants, commercial advantages, the inconvenience and disadvantage to which the citizens were subject, from having to go for the administration of justice by impassable roads, a distance of fourteen leagues to the *villa* of Bayamo, as likewise the well known advantage arising from the advancement of the settlement of that part of the Island contiguous to foreign parts.

"In order to proceed with the exactness which was requisite in affairs of this nature, it was ordered on the 21st of October of the aforesaid year 1830, that my Governor, Captain General should appoint a person, in his confidence, to proceed to the *apeo* (judicial survey,) and demarcation of the lands of said *pueblo* of Manzanillo, designating those necessary for *propios, ejidos, dehesa de labor*, (pasture land for working oxen and horses) and pasturage of cattle; that he should mark out with all possible exactitude the jurisdictional limits (*terreno jurisdiccional*) which were to be assigned to it and the *partidos* which it should embrace; that in defect of *propios*, he should propose the *arbitrios*, which he might deem proper to cover the municipal expenses, for which purpose he was to form an *expediente* with citations of the owners of coterminous lands, or of those who might for any cause be presumed to have a right to be heard; that he should take proof of the exact number of souls in Manzanillo and of the neighboring *partidos*, which it might be proper to include in its jurisdiction; that he should select the edifice which ought to be set apart for the Council House (*casa de Ayuntamiento*) and prisons, or if there should be none suitable for the purpose, then of the land most suitable, whereon to build them, forming plans, estimating the cost of the works, and proposing, at the same time, the means and *arbitrios* which he might think least burdensome to defray the expenses, without detriment to my royal *Hacienda;* that he should form the municipal ordinances which should govern *ad interim*, for which, and all else that he might deem necessary he should give audience to the inhabitants in a *Junta* composed of four or five of the best informed; proceeding in all things with the greatest dispatch, without any vexation or oppression of the inhabitants, and that he should report all with his *informe.* In pursuance whereof, my Governor Captain General committed the execution of the aforesaid proceedings to the Lieutenant Colonel *D. Fulgencio De Salas*, who, as the result of his first investigation, manifested that the discharge of his commission was the work of a long time, and would occasion a delay much to be regretted in the indispensable separation of *Manzanillo* from the jurisdiction of Bayamo, which, without suspending the other measures, might be effected immediately, designating for the division line of the *termino* and jurisdiction of Manzanillo that marked by the *Estero* and *Cienega del Buey*, river *Gicotea*, river Tarquino as natural limits, closing the distance between the sources of the two rivers by two right lines, one extending from the *Gicotea* to the Buey, and the other from the Tarquino, by which demarcation, there remained in the new jurisdiction the *partidos* of Yara, Gua and Vicana, leaving still in the jurisdiction of Bayamo, a territory much more extensive. Upon this exposition of the Commissioner Salas, my said Governor, (Captain General,) consulted with the superindent sub-delegate of my royal *Hacienda*, and both chiefs concurring in respect to the convenience and utility of the emancipation of Manzanillo, with the aforesaid demarcation, the former made report of all for the corresponding determination (of the king). The subject having been examined with all that mature deliberation which its importance exacted in my Council of the Indies, they acquainted me with their opinion in a *consulta* of the 5th June last, and conformably therewith, I have determined to concede the title of villa to the *pueblo* of Port Royal of Manzanillo, in the said Island of Cuba, with the said jurisdictional territory designated by the Commissioner D. Fulgencio de Salas, and the establishment of an Ayuntamiento, composed of two ordinary Alcaldes, which my Governor Captain General will appoint for the first time, and six *regidores*, declaring these last offices vendible and renunciable, with respect to which the *Intendente* will form an *expediente* and proceed conformably to the laws. Likewise, I have deemed meet to charge my said Governor, very particularly, that he take the necessary measures, to the end, that as soon as the Ayuntamiento be formed, it occupy itself in expediting, as much as possible, the proceedings commanded in the order of 21st October, 1830, at least, those which may take place most conveniently, and with the least expense, difficulty or delay, reserving to myself the prerogative to take measures for the appointment of sub-delegate of the four causes, (Justice, Police, War and *Hacienda*) in Manzanillo, whenever I may determine upon the *consulta* of my said Council of the Indies, with respect to the establishment in the Island of Cuba, of *Alcaldes, Mayores Letrados* similar to what was done in Porto Rico, and considering that the advantages resulting from this concession are greater, with respect to the State than the citizens of Manzanillo. I have determined to declare it exempt from the services designated to those of this class in article 16 of the Royal Cedula of 3d Aug., 1801.

"In consequence, it is my will, that the said *pueblo* be perpetually styled and called *villa* of Port Royal, of Manzanillo, and as such use the jurisdiction corresponding to it with the possession of the pre-eminences which it may and ought to enjoy. Given in the Palace, 19th of August, 1833.

"I, THE KING."

§ 31. From this document several important conclusions are deducible in harmony with the laws and authorities before cited.

1. That no power short of the Sovereign, could erect a municipal corporation at Port Royal, give to the inhabitants a separate jurisdiction and local government, and segregate them from that of Bayamo, in whose *termino* they had been comprehended, though fourteen leagues (nearly 40 miles) distant from it. The Captain General of Cuba, though possessed of the *omnimodas facultades*, the plenary powers of the Viceroys could not even take the initiatory steps, so as to create the slenderest inceptive rights or franchises, but forwarded the *expediente* directly to the king, by whom the initiatory orders were given. This is a practical expositions of L. 6, T. 8, lib. 4, R. I., as late as 1830–3.

2. That a municipal corporation may be fully established with its *termino*, or jurisdictional limits marked out and defined, and its Ayuntamiento and other authorities fully installed, without giving that corporation any shadow of right to lands within its limits, or to any other property whatsoever. For at the time when the king signed the charter for Port Royal, not only had no grant of lands been made to the town, but the lands had not been marked out under the orders which the Commssioner Salas had received for that purpose, but to execute that part of the royal mandate, he had reported would be the work of a long time. There must be an *apeo*, a technical expression well understood in law, meaning a judicial survey, with many indispensible formalities. An *expediente* must be formed—there must be indispensibly a citation of *colindantes*, and "of all who, for any cause might be presumed to have a right to be heard." Of course on a subject so immediately affecting the inhabitants, as the demarkation of lands for their *propios*, *ejidos*, *dehesa de labor*, and *pastos* he must give them audience. All this, however, to be executed with that exactitude which is required in affairs of this nature would require a long time, and was left undone, and consequently when Port Royal got its charter, it got no grant of land with it, and although it was probable that at some subsequent day, some of the lands within the extensive territory which its jurisdiction embraced, would be surveyed off, assigned and granted to it; yet, nothing is clearer, than that at the time of its incorporation, it had no lawful claim to any particular tract of land within the three *partidos* which it embraced. Manzanillo had been a *pueblo* for a long time with a numerous population and a considerable commerce, when it was erected into a corporate town or *villa*, but the question of *pueblo* or no *pueblo* was not agitated, it seems, as affecting the question of lands or property, and although L. 6, T. 5, Lib. 4, R. I. was in force in Cuba, nothing appears to have been suggested

about *that four leagues square*, either by the inhabitants, the Commissioner Salas, or the Captain General, nor by the learned Council of the Indies. The Commissioner was also required by the Royal Order of 21 Oct., 1830, to select the edifices for Council House and prison, or if there should be none suitable for the purpose, then the lands whereon to build them. These lands would of course be in the heart of the town and would be selected from some of the vacant or ungranted lots, the property of the king, and which, when selected, and reported to the king, he intended to grant to the town for the purposes indicated in the order. Had these lands been vested in the town from and by virtue of its establishment or incorporation, the Royal Commissioner would have nothing to do, but the town would select for itself and make use of its own lands for any municipal purposes not forbidden by the laws.

§ 32. I had proposed to defer my remarks on the subject of *Terminos Comunes* about which there has been so much legislation in Spain, until I should have occasion to refer the laws of the Indies, relating to the establishment and settlement of towns, and particularly the orders and regulations, which are made especially applicable to California. But the laws of the Indies were framed in Madrid by Spanish jurists who employed terms and expressions, the sense of which has to be ascertained from the then existing state of legislation in Spain; I shall, therefore, refer first to those laws of the recopiliation of Castile, in addition to that already cited, which are supposed to be applicable, and some of which are really applicable to towns in America, but which are too often considered as *conferring* rights of property, when it is scarcely necessary to say, they are intended only to protect such as have been legitimately acquired.

§ 33. L. 6, T. 5, Lib. 7, R., which is L. 1, T. 21, Lib. 7, N. R., commands, "that the councils, cities, *villas* and *lugares* which may have purchased, or gained by time, any *aldeas*, fortresses, or *terminos*, being in possessions, be not despoiled thereof without being cited and heard, and the right of each one being determined by law; and if in fact they be despoiled, that restitution be made without delay." (A. D. 1325 and 1432.)

There had been at the date of this law as we have already seen, granted to cities and *villas*, as well as to individuals, *aldeas*, (small villages,) fortresses, *terminos poblados* and *terminos yermos* (settled districts and desert districts) by royal patent, and sometimes they had been possessed and held from time immemorial by which they were enabled to sustain their right thereto by the law of prescription. At one time it was doubted whether *individuals in* possessions of, and claiming the Seigniory of cities, *villas* and *lugares*, and exercising the civil and criminal jurisdiction without being able to show a royal patent therefor, could prescribe for the same as against the Crown, and it was resolved by L 1, T 15, Lib. 5, R. which is L. 4, T. 8, Lib. 11, N. R. introduced into these codes from the *Ordenamiento* of *Alcala*," that immemorial possession proved according to, and with all the qualities required by the law of *Toro*, which is L. 1, T. 17, lib. 10 R., shall be sufficient to acquire against the king any cities, *villas* and *lugares*, and jurisdictions, civil and criminal, and anything or part thereof, with all that to the *seigniory* and jurisdiction, are annexed and appurtenant." The *aldeas*, fortresses and *terminos* which might be in the possession of cities and *villas* might be gained by time, which would be regulated by the law last referred to, provided the possession was attended with all the requisites prescribed by the law of *Toro*. As to the extent and nature of the interest which the towns had in the *terminos valdios*, some authorities will be referred to in another place.

It is also ordained by L. 1, T. 7, lib. 7, R. or L. 2, T. 21, lib. 7, N. R., "That all the *ejidos, montes, terminos* and hereditaments of the councils of our cities, *villas* and *lugares* of of our kingdoms and Seigneuries, which are taken and occupied by any persons whomsoever, on their own authority, or by virtue of any letters of ours, be at once restored and returned to the said councils whose they were and are. But we declare that the said councils cannot work (*labrar*,) sell nor alienate them, but that they remain (*sean*) for the common advantage (*pro comunal*) of the said cities (*villas*) and *lugares*, where they are situated, and if any persons have worked or occupied anything of the same, let it be immediately disoccupied. And we command the same with respect to the *ejidos* which the *Pueblos* have and possess, that they be not cultivated for the production of grain, and if any one shall have our authority so to do, let him send it to us, so that in view thereof, we may dispose according as our pleasure may be, (A. D. 1329.)

§ 34. "The privilege of the University," says *Perez* (*Comp'o del derecho Publico y Commun de Espana*, V. 1, P. 332) " or town (*poblacion*) are firstly, to have defined *terminos*, the designation whereof is in Spain, the *exclusive* prerogative of the Sovereign, and it being found to have been done by the King or admitted by immemorial custom, the said *terminos*, (that is the whole extent of territory embraced within its jurisdictional limits) or that which they comprehend, are properly called the endowment (*dote*) of the University, and the author refers in a note to the law of the *Ordenamiento Real*, which I have before cited (ante § 19,) and L. 1, T. 12, lib. 4, R. I. which ordains the dirtribution of lands among settlers, and defines the various measures therein referred to.

"The division of lands was made by authority of the King of *Castile*. They never pertained by right to those who occupy them until the king donated them and their jurisdictions, *lugares*, *villas* and cities," (ib, 331.)

The *termino* is the territory, district, or jurisdictional domain assigned by letters patent to any town or particular Lord, and the town or rather its inhabitants had at the date of the laws first referred to, and indeed all times prior and subsequent thereto, the right of enjoyment in common to the wood, water and pasturage, and natural products of the whole *termino* assigned to it, *Elizondo Prac. Forense V.* 5, *p.* 230.)

But the right of common use was not vested in the Council or Corporation which stood in place of the individual Lord as we have seen from the authorities cited (see ante §13) for "*quis dominium jurisdictionis appidi, alicujus habeat, non est dominus comunium pascuorum illius oppidi quæ in hoc Lusitanæ regno, Baldios vocant, sed intiger populus et communitas eorum habet dominium*" (*Molina de justitia et de jure, Tract* 2, *Disput* 59;) and therefore the same author treating on the *montes* (Tract 2, Disput 38) and the unlawful or excessive use and destruction of wood and timber by one of the citizens or commoners, although he states that he is obliged to make restitution to the community, limits the liability in these terms:

"Neque tunc id totum restituere tenetur: eo quod oppidanus sit; et partem quamdam eorum sine onere restituendi potuit scindere sibique asciscere, solum ergo incrementum damni supra id quod sine restitutionis onere scindere potuit, tenetur restituere."

(Coveruvias Prac. Quaest. Cap. 37,) is to the same effect.

§ 35. But the right of common in cases dependent solely on the general laws of Spain and the Indies, and not originating in special privilege, grant or contract, that is the common use and enjoyment which the *vecinos* have in the *terminos publicos* and *consejiles* of the cities, *villas* and *lugares*, was only a precarious servitude existing by sufferance in the royal lands remaining undisposed of, notwithstanding the numerous laws and authorities, which, when not well understood are calculated to induce an inference to the contrary, which did not restrict the *Sovreign's* full and absolute property in those lands, nor impede the free disposition thereof, a right which was fully exercised by the decree of the *Cortes*, of January the 4th, 1813.

To elucidate this observation let us refer briefly to the history of the subject, and then to the laws and the authorities.

"The Gothic laws or those of the *Fuero Juzgo*, which ever since the year 409 have superseded those of the Romans in Spain, were general in the kingdom and maintained for many centuries an equivalent system" (in regard to the respective rights of individuals, and of the University) distinguishing in the rules applicable, the cultivated lands from the *montes* and uncultivated lands.

"By right of conquest the Goths occupied two thirds of the improved and cultivated lands as soon as they had subdued the country and established their Monarchy therein, leaving the remaining third in each *pueblo* to the ancient residents who were denominated Romans in the Gothic laws.

"This division on which is founded the private property and dominion of lands and estates in Spain, is that referred to in L. 9, T. 1, Lib. 10, of the *Fuero Juzgo* in which that distribution is required to be respected not only in favor of those who first acquired the improved and other lands included in the general division made at the time of the conquest, and the irruption of the Goths in the peninsula, but likewise in favor of their children and descendants, with the salutary view that the conquerors and the conquered should form one nation, and that their families should continue firmly rooted and devoted to husbandry.

"The enjoyment (*apro vechamiento*) of the *montes* and uncultivated lands which were not included in the general distribution, remained common and promiscuous between the Goths and the Romans as the general patrimony of the people, as may be seen L. 10, T. 1, Lib. 10 of the *Fuero Juzgo.*

" This system, which endured for the three centuries of the Gothic Monarchy, defined the private dominion of individuals and the general dominion of each *pueblo*, the dispositions of those laws inclining to favor the distribution of the *montes* with equality among the citizens, (*vecindario*,) in order that all should apply themselves to the cultivation and improving of them, since, as observes *Alfonso de Villadiego*, "the indivision causes the improvement (*majora*) thereof to be neglected, which can only be secured by means of just rules which give to each citizen a definite participation in the enjoyment of the *montes*, their pasturage, acorns, wood, and other productions."

" Although the invasion of the Arabs diminished the splendor of the Gothic Monarchy, its laws maintained all their vigor in the country, since in the time of *S. Fernando*, who flourished in the thirteenth century, the laws of the *Fuero Juzgo* were yet preserved in vigor, and that glorious king extended them to his new conquest of *Jaen*, *Cordoba*, *Sevilla* and *Murcia*, regarding them as the fundamental laws of the kingdom.

" The government of the Goths having endured from the beginning of the 5th till the 13th century, the distinction was inviolably observed in that whole series of eight centuries, between the private dominion and the municipal of the *terrenos publicos o' consejiles*, the latter being governed by the judiciary (*justicias*) and *Ayuntamientos*. As soon as the land was recovered from the Moors, the *Montes*, were assigned (*Aplicados*) to each town, (*poblacion*) in the general distribution and demarcation of (*terminos*) preserving substantially the system of the Gothic laws with all the enjoyment *alto y bajo* (in the mountains and vallies) with the exception of those lands which fell to individuals by distribution, gift, or other legitimate title."

" In some towns and localities the trees produced on lands of private ownership, were reserved to the common use, which practice still exists in various districts of the kingdom, so that the individual is owner of the soil, and the Pueblo or *comun*, (community,) of the wood and natural products," (*Escolano Practca del Consejo Real, v.* 1, *p.* 231.)

§ 37. The *terminos publicos* or *comunes* and *consejiles*, or the commons of towns, embraced all the public and vacant lands in Spain, the which were assigned to each town respectively at the time of the general demarcation of limits.

The uniform policy was opposed to their alienation by the Crown, to whom the property therein appertained (L. 8, 9, 10, T. 21, L. 1, 2, 3. T. 23, & T. 24 & 5 Lib. 7, A. R.,) and this policy was affirmed in the most solemn form, in the contract between king and people, known as *condicion de millones*, in which the representatives of the *pueblos* in the *cortes* granted to the Crown the sum of seventeen millions in aid of its necessities, (L. 2, T. 23, Lib. 7, N. R..) and the Sovereign promised for himself and successors not to sell vacant lands (*tierras valdias*) nor trees, nor the fruit thereof, and that the same should remain as theretofore, to the common use and enjoyment.

§ 38. In America, shortly after its discovery and first settlement, the use and enjoyment of all the vacant public lands were declared to belong to the citizens in common, (L. 5, 6, 7, 8, & 9, T. 17, Lib. 4, R. I,) which is understood to be restricted in the same manner as in Spain, to the citizens of the respective towns within whose *termino* or demarcation the said public and vacant lands may exist, unless some special provisions have been made to the contrary, as in L. 3, T. 8, lib. 4, R. I., which ordains "that the Judiciary of the city of Mexico have jurisdiction, civil and criminal, within the fifteen leagues of the *termino* which has been assigned to it, provided that all the said *termino* (of fifteen leagues extended each way) be of *pasto comun* (common pasturage,) for all the citizens, dwellers, and settlers in New Spain, during such time as the same may be unoccupied with crops, as is provided in our laws and ordinances," which are those referred to above, namely:

"L 6." The lands and hereditaments whereof we shall make gift and sale in the Indies, the sown crop being removed, must remain for common pasture, (*pasto comun,*) except the *dehesas boyales y cousejiles* (A. D. 1536) L. 7, "the *montes, pastos and aguas* of the places and the *montes* embraced in the *mercedes* which shall be made, or which we shall make of *seignueries* in the Indies must be common for all the Spaniards and Indians, and we command the viceroys and *andiencias* that they cause this to be observed and fulfilled (A. D. 1533,) L. 8. " Our will is to make, and by these presents we do make the *montes* of rustic fruit common, and every one may gather it and take away the *plantas,* (trees planted,) to set in his own lands, (A. D. 1533,) L. 5. " We have ordained that the *pastos, aguas and montes* remain common in the Indies, and some persons without our authority have occupied a great part of territory and lands in which they do not allow any one to put *corral,* nor bring hither their flocks. We command that the use of all the *pastos, montes* and *aguas* of the provinces of the Indies be common to all those who now are or hereafter shall be *vecinos* thereof, &c., (A. D. 1559.)

§ 38. But this common use and servitude created by these general laws, and sustained during so many ages, did not restrict the Sovereign's full and absolute property in those common lands of the *consejos* or *pueblos*, which, in the demarcation of limits, might be comprehended in their *terminos,* nor impair his right freely to dispose thereof; "for," says *Elizondo,* " the kings, fountains of jurisdictions are the owners, (*dueños* of all the *terminos* situated in their kingdoms, and as such can *donate* them *divide* or *restrict* them, the same being true of their *pastos,* although the *pueblos* enjoy them, it being presumed that they are conceded only so far as respects their use and administration, the property remaining in the Sovereigns themselves, so that they may limit them afterwards, enlarge or restrict them, or give any new form to the enjoyment (*goce*) thereof, and hence it is, that the *pueblos* cannot alienate their *terminos* and *pastos* without precedent royal license and authority." (*Practica Universal Forense,* v. 3, p. 107. See also 108–112.)

§ 40. The same author in part 2, chap 11, (v. 5, p. 226,) entitled, "*Recursos extraordinarios para la enagenacion y venta de los bienes publicos consejales,*" treats more largely of the subject, and considering many misconceptions into which American Lawyers, and the courts, too, have fallen in relation to it, I beg your permission to copy his remarks at length.

" There is nothing whatever designated by law as belonging to towns, other than that which by royal privilege, custom, or contract between man and man, (*disposicion de los hombres entre si,*) is granted to them, so that, although there be assigned to the towns, (*poblaciones*) at the time of their constitution *a territorio and pertenencias*, which may be common to all the residents without each one having the right to use them separately, it is a prerogative reserved to the princes to divide the *terminos* of the provinces, and the *villas*, assigning to these the use and enjoyment, but the dominion remaining in the Sovereigns themselves.

§ 41. "The property (*bienes*) of the community of each *pueblo*, we find designated, by *Don Alonzo*, the Wise, and restricted to the fountains, *plazas, arenales,* (aluvions) in the banks or the margins of the rivers, *ejidos*, places where horses run, (*i. e.* race courses), *montes, dehesas,* fields, vineyards, and all other similar places, (*sitios*) which may be used by every resident, poor or rich, but not by those of another town (*poblacion*) contrary to the will of the *vecinos.*

" Upon these principles of power and prerogative rests the law established by the Catholic Sovereigns in Cordoba, on the 3d of Nov. 1490, prescribing that any person, whomsoever, to whom the king may have made, or shall make grants of any Cortijos, (a location in the country for gathering fruits and crops, and keeping small stock,) hereditaments and lands in the *terminos* of the cities, *villas* and *lugares* of the kingdom of Grenada, cannot, without *royal and special license,* fence up (*dehesar*) and keep to himself (*defender*) the herbage and other products which the land bears spontaneously, the same remaining open (*libre*) so that all the *vecinos* can consume it with their cattle, beasts and working oxen, the same not being, (at the time,) planted or sown, under the penally that he who contravenes (this law) shall lose whatever right he may have and the lands to remain for common.

§ 42. "Upon the same principle of sovereignty, the princes, may alter, restrict or enlarge the *terminos* once assigned to any town (*poblacion*) giving them new form, or revoking the ancient, without any *pueblo* whatever being able to acquire exclusive right to their *pastos* against the king, otherwise than by his privilege, (special grant), or immemorial prescription.

"And from these antecedents, arises the justice of the *incontrovertible practice* in the recovery of lands called of *realengo*, (royal lands), so that in cases of doubt they are to be adjudged such, the princes having in possessory and petitiory suits, their demand so far established (*fundada su intencion*) that the possessor must be required to exhibit his title, and not doing so, that the lands may be applied to the royal patrimony.

§ 43. "We may reduce the *pastos* of the *pueblos* to four principle classes; one of *valdios* or *comunes*, another of *arbitrados*, (or those royal lands which to supply some special necessity, the *pueblos* may have been authorized by special license of the king, to inclose and rent out for a limited time in aid of the municipal funds), and another of *propios*, and another of individuals, which it is convenient not to misunderstand by reason of the different rules which apply in this matter. The first are of the *vecinos* or commoners, (*i. e.* for their use), exclusively, and in the second, the former (*vecinos*) have the legal preference, which is recently so declared and not altered by the resolutions of the Councils. The same *tanteo* (preference in purchase, if he gives as much as another offers) belongs to the commoners in this class of *pastos acotados* (inclosed for private use) to their prejudice when the object of the *arbitrio* (means of raising funds) is verified, they paying the price without necessity of distributing all the rights of the community.

"The dominion in the *pastos propios*, (of the lands belonging to their *propios*) can not be disputed with the *vecinos* ever since the establishment of the legislation of the *Partidas*, in which, *speaking of them*, Don Alonzo, the Wise, thus expresses himself: 'although they belong in common to all the residents of the city or villa, whose they were, &c., the utility or benefit of their products belonging to the University.'

§ 44. "The application (*pertenencia*) of the *dehesas* or *pastos acotados* of individuals which exist within the *terminos* of the *pueblos*, is the last of the four classes into which we have divided their lands, the *acotamiento* (inclosure for private use) being the effect of *privilege*, or of that possession which supposes it, the lords of vassals in their jurisdiction having no power to donate any thing of the *bienes comunes* without royal authority, or to permit lands to be converted into (private) pasture to the prejudice of those to whom the use of them belongs, which power (*facultad*) is among the prerogatives reserved to princes and of which they make use for just cause, looking to the common good of the *vecinos*, it being important to the public welfare that the *pastos* be preserved, and that they reduce not their lands to cultivation contrary to (*en ofensa de*) their original institutions, (*sus primeros establecimientos*). So that we find prohibited the mutation of the *pastos*, even with the consent of the *pueblos*, without royal authority thereunto empowering them.

"Immemorial possession is another title, which, sufficiently proved (*bien probada*) (the which we may calculate is very difficult) has the force of title, concession and privilege for the *cerramiento* and *acotamiento* (conversion to private use exclusively) of lands in which the presumption of law is in favor of the *vecinos*, without the necessity of proving the dominion or right to their use, which is for him to prove (the contrary) who denies it, every individual of the *pueblo* being entitled to prosecute the popular action in order to resist the limitation or injury which the owners of vassals themselves may attempt against their *pastos*, and commons (*aprovechamientos*.)

"Hence it is that before the privilege, it must be presumed that the *pastos acotados* were common to the *vecinos* in whose territory they might be, because the *pueblo* and its inhabitants have already proved by law, their claim to commons (*aprovechamientos*) and *pastos* of the whole *termino* which was assigned them.

"To this presumption and legal assistance is added one other, which is, that as it requisite when the privilege be conceded for the *acotamiento* (conversions to private use) that it appear that the necessary *pasto* is left for the citizens; if this circumstance ceases or varies, it is necessary likewise to moderate the privilege, as it had its origins and was issued with a cause or condition which has prospective variation (*tracto sucesivo*) and is subject to the accidents of time; so that the most delicate modifications which the privilege can receive, and the least prejudicial to the holder (*privilegiado*) is to restrict him somewhat in the liberty to rent out his *pastos acotados*, requiring that he have respect to, and prefer the *vecinos*, without prejudice to their value in that which may be regulated as necessary or convenient."

§ 45. The lords of vassals can do nothing in the *pastos publicos* which may prejudice the other *vecinos* admitting strangers to participate in the benefit, or renting, or selling them, they being reputed, in respect to these points, as two *vecinos* only, and with the qualities of real co-partners (*compañeros* with each other, without any other especial distinction, except that of being regarded as having a double personality with respect to the enjoyment.

§ 46. "Let us return to the consideration of the right which the *pueblos* have to the *pastos publicos* and funds (*ramos*) of the university, restricted purely to the use and administration of them. *Whence it* proceeds that *they cannot in any manner* sell or alienate them without *royal authority* therefor, for the extreme inconveniences which were represented by the kingdom assembled in the *Cortes* of Valladolid, in the year 1540 to the Señores D. Carlos and Doña Juana, his mother, which sovereigns came thus to ordain.

"From this antecedent, we deduce that the royal authorization ought to *precede every* alienation of public property, (*bienes,*) and rights of property, (*derechos,*) the former not being presumed by any lapse of time, as would be any other extrinsic solemnity of an act, except where the alienation has transpired for a period over one hundred years, by which antiquity the presumption that royal permission was obtained *begins* to operate.

"For the same reasons the *pueblos* can not incumber with *censos* the public property (*bienes*) without royal authority, although the capitals may have been converted to their common benefit, and those who impose the incumbrance (*los imponedores*) prove it conclusively, (*plenamente,*) who must remain solely responsible for the satisfaction thereof, and not the *propios*, or any other public revenues (*caudales publicos.*)

§ 47. "In the legislation of the Indies, after designating the place in which the towns (*poblaciones*) are to be founded, and the circumstances which are to precede their establishment, it is ordained that there shall be assigned to them *dehesas* which shall confine with the *ejidos*, in which to pasture the working oxen and horses, and cattle for the slaughter [*corniceria*], and for the ordinary number of others which the settlers are required by ordinance to have, with a good deal more, which shall be *propios* of the Council, [*consejo,*] the rest being used for tillable lands of which *suertes* shall be made, as many of them as there may be *solares* in the town, [*poblacion*], L. 14, T. 7, lib 4,] prescribing that if any individuals shall have occupied any lands of the public and municipal places, [*lugares publicos y consejiles*], the same must be restored according to the law of *Tolido*, [which is L. 5, T. 21, lib. 7, N. R. or L. 3, T. 7, lib. 7, R.] and those which prescribe the manner in which restitution is to be made, and define the right of prescription when interposed as a defense by individuals, [L. 1, 2 and 3, T. 7, lib. 7, R.] without the Viceroys and Presidents granting commissions for composition of lands, unless in cases of evident necessity, and with precedent notice to the king of the cause which may induce them to do so, in what places [*lugares*] the lands are, to what persons they appertain, how long they have possessed them, and the kind of timber plantations, and lands without trees. [This law dates 1618, nine years after L. 2, T. 23, Lib. 7, N. R. knowh as *condicion de millones*]. The *propios* [*bienes de propios*] being wholly governed, as respects the alienation of them by the laws of Castile, to which the special laws of the Indies are conformable. [See Laws of T. 13, L. b. 4, R. I.]

§ 48. "The necessity which the *Pueblos* have to obtain royal authority for the alienation of public property [*los bienes publicos*] being granted, it is indispensible that we now consider whether the councils [*consejos*] can *per sé* [on their sole authority] dispose, so far as regards the administration, and good government, giving license to build in the places [*lugares*] of the University for the ornament, decency and convenience of the towns [*poblaciones*] or to construct mills, fulling mills, and other improvements from which advantage will ensue to the community [*comun*] without the need of royal authority therefor, except in the Kingdom of Granada, where the mill seats [*sitios*] belong to his majesty, and they can only be used by way of renting for the benefit of the royal treasury for the time, price, and with the conditions that may appear convenient.

§ 49. "Señor Don Alonzo, the Wise, speaking of the public places, [*sitios publicos,*] and under what circumstances one may build in them, expresses himself in this wise: 'If any man commence building in the *plaza* or in the street, or common *ejido* of some *Lugar*, without authorization from the King, or of the Council, [*Consejo*] in whose land, [*suelo*] he may be doing it, then every one of that *Pueblo* can forbid so that he proceed not with the work, &c., which language, clear and explicit, shows at once that the license of the *Ayuntamiento* alone is sufficient in order to build in public sites and places, [*sitios y lugares publicos.*]

"In the same legislation of the *Partidas* treating of where, and in what manner a mill may be constructed near to another, it is prescribed [L. 18, T. 32, p. 3] that any citizen may build it in his estate, [*heredad*] or in land, [*suelo*] which may be of the *termino* of the King with authorization of his majesty, or of those of the community of the Council [*Consejo*] whose is the place [*lugar*] where it is desired to do it, in such manner that the course of the water do not impede the operation of the former, but leave it free to perform its functions in the same manner as before; all which obtains though there be opposition from the owner of the first, and he should allege that by reason of the new one, his mill will produce less revenue; and the same is to be observed in respect to the ovens which may be newly constructed.

"This legislative disposition rests upon the principle that the construction of mills, fulling mills and ovens or other buildings, is not an act of jurisdiction, but of pure dominion, conformably with which, and the natural liberty which men have to use their patrimony, they may execute those works in private rivers, and even public and navigable ones, without royal authorization, not in any manner impeding the natural course of the waters."

§ 50. We have heretofore seen by the references which have been made to express laws, to several eminent writers on the fundamental laws of Spain and from numerous references to historical facts, showing when and how some of the principal towns in Spain and America first became invested with their corporate rights, revenues and property, that in all Spanish countries corporate towns can only be erected by royal charter, *cartas Pueblas* or *privilegios de poblacion*, within the terms of which *all their rights* are restricted, and that this incontrovertible principle prevailed at the date, and must be applied in the interpretation of all the laws which have been cited here or elsewhere from any of the Spanish codes, and moreover that the same principle has been recognised and uniformly applied in practice, at all times, even from the foundation of the Spanish monarchy.

§ 51. By a review of the foregoing observations of Elizondo, we find that they embrace the following propositions:

1. That towns have inherently no property, neither is any conferred upon them by general laws, but their claims to property are subject to the same laws, as those of individuals [see ante §§ 21, 40.]; and it must be remembered that he is speaking in view of all the legislation both of Spain and the Indies, and of the practice of the Supreme Council of the Indies as well as that of Castile of which he was a member. His work is upon the "*Practica Universal Forense de los Tribunales de España y de las Indias,*" and these Supreme Councils were the tribunals which had exclusive cognizance in most cases, of the subjects treated of in the observations cited.

Keeping this principle in view, we are enabled the better to understand that celebrated law of the Partidas [L. 9, T. 28, p. 3] cited by the Court in the case of New Orleans *vs.* The United States [10 Peters, 723.]

"Apartadamente son del comun de cada una cibdad o villa, las fuentes e las placas o fazen las ferias e los mercados e los lugares o se ayuntan a consejo e los arenales que son en las riberas de los rios, e los otros exidos e las carreras o corren los cauallos e los montes, e las dehesas, e todos los otros lugares semejantes destos *que son establecidos e otorgados* para pro comunal de cada cibdad o villa o castillo o otro Lugar."

Son del comun. Sed an quoad dominii usum tantum?" very pertinently inquires Gregorio Lopez. They are of the *comun*—of the comonalty of each city, &c., but by what tenure, what is the nature and extent of their interest? The celebrated author referred to, answers this query substantially in his observations upon the clause "*son establecedos.*" "Preterea quod hic dicitur [*que son establecidos*] non intilligitur quod *a jure* sunt statuti pro civibus: quia civitati vel castro de *jure* nihil coporale est deputatum quod sit de ejus pertinentia; nisi quatenus a lege, aut consuetudine aut hominum dispositione reperiatur concessum," and after citing several authorities in confirmation of this *maxim* [for such is its character in Spanish jurisprudence] concludes, "et ita potest intelligi ista lex cum dicit [*que fuessen establecidos*] scilicet, ab hominibus vel statuto: et sic quod verbum [*que*] ponatur restrictive": that is the word *que* restricts what is before said in this law, to those things which *son establecidos* [which are granted or acquired by some legitimate title] and the proposition is not, that the things referred to *are establecidos* but that those *which* are *establecidos*, not *a jure*, but by contract, or special act of the Sovereign power, are of the *comun* of each city &c., in which case the *documents* will show by what *tenure* they are held; because as the author observes, nothing corporeal is designated or specified by law as *pertinentia* of a town [civitati] except so far as the same may have been granted by *lege, aut consuetudine, aut hominum dispositione;* and it must not look for any rights of property deduced *a corpore juris* or from the *cuerpo del derecho*, nor understand this law as conferring or recognizing any such; but as referring to and protecting such as may have been legitimately acquired. And the words *son establecidos* must not be understood that *a jure sunt statuti pro civibus ;* for the law *grants* nothing to municipal corporations or communities any more than to other corporations, or to individuals. There are many laws [though they are now abrogated] expressive of the sovereign will that lands shall be assigned and granted to towns, and there are just as many expressive of the sovereign will and pleasure that lands and lots shall be assigned and granted to individuals who may go to settle new places, but neither the one nor the other can found a claim of title upon those general laws, nor make out from them the slenderest equity conceivable.

§ 52. That after the limits of towns have been legally established, which can only have been done by act of the supreme authority [see ante § 17, 34,] the sovereign remains the absolute owner [see ante § 40,] of all the lands within those limits to which a legitimate title cannot be shown by individuals or corporations [ante § 42] ; that as such he may freely donate or distribute them [ante § 39,] that he may alter, restrict or enlarge the limits once assigned to any town, or revoke them at pleasure, and that no town can acquire any right even to the use of the lands embraced in them *as against the Sovereign*, unless by special grant or immemorial prescription [ante § 42], that is, in the same manner as any individual or other corporation; and the right of common, which the citizens enjoy, though exclusive of those of other towns, is not in exclusion of the Sovereign's right of property and possession, and consequently the only acts which the municipal authorities can do, affecting these lands, are such as are purely administrative and belong to the local jurisdiction, conferred by the charters. The council and judiciary [*justicia*] of towns exercise the local authority of the government. In the charters or *Privilegios de Poblacion*, is generally granted the power to administer justice in first instance to the citizens, as well as to exercise the local government *Politico-econimo* over all the inhabitants of the *Termino* or demarcation assigned to the city or *villa.* They cannot, however, inclose for their own or any private use, any portion of these lands without direct authorization from the sovereign proprietor. But "when a *Pueblo* finds itself in circumstances of necessity, and destitute of funds, it has been the custom to grant to it authority for a limited time, to break up [*romper*] sell or incumber some portion of these *tierras comunes* and inclose them for private use; and as this is an expedient [*arbitrio*] which is resorted to in order to relieve the urgency, they are distinguished with the name of *propios arbitrados.*"—[*Compendio del Derecho Publico y comun de España,* V. 1, p. 336 refers L. 5, T. 27, Cap. 28. Lib. 7, N. R.]

§ 53. Continuing now our references in support of the proposition contained in section 35, and the deductions which I have just expressed, we shall find the whole course of Spanish legislation in harmony therewith. Respecting L. 1 and 2, already cited at length [ante § 33], and all the following of Tit. 21, lib. 7, N. R., a few general observations will suffice, in addition to what has been said already in the quotations from Elizondo, and the deductions drawn therefrom. The first law referred to speaks expressly of those things which have been purchased or gained by time-immemorial prescription, and which, to the extent of the interest that may have been thus acquired would constitute a legitimate property.

The remaining laws of this title and those of title 22, 23, 24 and 25, Lib. 7, N. R., show that the general policy of the Spanish government was opposed to the alienation of public lands, or their conversion to any other use than that of common pasturage, but they do not show or contain any evidence whatever that the towns or citizens thereof, individually or in common, owned *anything*, much less *any lands* except such as had been *conveyed* to them by the Sovereign or other proprietor—L. 2, T. 23, lib. 7, N. R., refers to the contract entered into by the King with the *Procuradores* of the towns of the kingdom, known as the *Condicion de Millones*, it being put as a condition to the grant of seventeen millions and a half, made by the towns or their representatives in the *Cortes*, to supply the necessities of the Royal Exchequer, and contains the promise confirmed with an oath of Philip Third, for himself and successors, that there shall not thenceforth be sold any *Tierras valdias*, nor trees, nor the fruit thereof, but that the same shall remain, for the use and enjoyment of his subjects, as they had theretofore, [A. D. 1609].

The preceding law in this Recopilacion which is from l. 8 and 10, T. 5, lib. 7 of the *Nueva*, and was promulgated in the year 1586, provides that judges shall not be appointed and sent out to sell or re-survey *Tierras Publicas y baldias* and that in cases where, for any cause, a re-survey of lands sold shall take place, the *Sobrante*—the overplus not included in the title issued, shall not be sold but shall remain for *Publicas* and *consejiles.*

These laws do not tend to prove that the sovereign was not the owner of the lands mentioned, but the contrary, except so far as the first part of the said L. 1, T. 23, Lib. 7, N. R., may be supposed to refer to the *propios apropiados*, or lands specially granted to municipal corporations, [*Derecho Publico y Comun de España* v. 1, p. 334–5], and which having been thus appropriated to private use, could no longer be denominated *baldios* or free lands [ib. 336.]

§ 54. The same remark may be applied to all the laws relating to the *terminos* of the cities, *villas* and *lugares*, "*Terminos comunes ò baldios.* [L. 4, T. 21, Lib. 7, N. R. L. 7, 8 and 10, same T. and Lib.] "*Terminos realengos y consejiles*" of the cities, &c. [L. 2, T. 22, same Lib.] "*Terminos Publicos,*" &c. The general policy of Spain was opposed to the alienation of the royal lands. It was thought more advantagous that they should remain common and free [*valdios*] for the poor and the rich alike, in the several towns within whose demarkation they were, and that the citizens of those towns should be required to bestow their care and labor so far as necessary in the preservation and reproduction of the timber, wood, and shrubbery upon them, and, as is said in Art. 14 of the Royal Ordinance of 1749 [L. 14, T. 24, Lib. 8, N. R.] "it cannot be regarded as a burden upon the towns or the citizens thereof that they are required to bestow labor in the preservation of the timber already grown, or to plant anew the woods, and free lands [*montes y tierras baldias*] although they be the property of his majesty, [*aunque seéan propios de S. M.*], because besides being obligated so to do, they enjoy the fruit thereof with pasture and shelter for their cattle;" by the increase of which and the more abundant supply of wood, coal, meat and provisions, their propios or private revenues would be augmented, [see also L. 22, T. 24, lib. 7, N. R. Art. 26]. The King, however, frequently did make grants of lands within the *Terminos* of the cities, villas and lugares, as may be seen in the law 2, T. 25, lib. 7, N. R., referred to in the remarks I have translated from Elizondo [ante. § 41.] and many others, but the owners were not allowed to exclude the citizens from the right of common except during the time that the land should be occupied with sown crops—the natural productions remaining free to all, unless such owner were empowered by royal privilege *specially conceded* for that purpose, to enclose and enjoy the lands exclusively.

The law of 15th June, 1788, however, which is L. 19, T. 24, lib. 7. N. R., and the decree of the Cortes of 8th June, 1813, abolish the right of common so far as respects lands of private ownership which the citizens of the respective towns had enjoyed from the earliest period of the Monarchy. The latter declares that all *dehesas*, hereditaments, and other lands of every class whatsoever pertaining to private dominion, be they free or entailed, are, to be thenceforth deemed as perpetually "*Cerrados y acotados*" [inclosed for private use exclusively] and the owners and possessors thereof may inclose them without prejudice to the *Cañadas* [paths] *abrevaderos* [watering-places] roads, crossings and servitudes [to which they may have been legally subjected, of course], enjoy them freely and exclusively, or rent them, as to them may seem most advantageous, and dedicate them to cultivation, or pasturage, or planting of trees [*plantias*] or to the use which may best suit them."

§ 55. The decree of the *Cortes* of 4th Jan. 1813, put an end to that system which has occupied so much of our attention, which had preserved for many centuries, the public lands for the common use of the citizens of the towns within whose demarcation or *termino* they were situated, and provided for their sale, distribution and reduction to private dominion. The utility of the measure had been well understood, and recommended by the most intelligent Spanish statesmen at different periods, but it was natural that the towns whose citizens enjoyed the free use of the lands and that most honored and privileged corporation, the "*consejo de la maesta*," representing all the herdsmen of the kingdom, as well as many of the churches and convents which enjoyed equal privileges within the *terminos* of their establishments, and the nobility and rich men, whose cattle "upon a thousand hills" were supported at the expense of the State, should resist it; and there was no period of time, till that which occurred from 1808 to 1813, when the old establishments were completely broken up, and Spanish society was reduced to its elements, that this law fraught with such advantage to the country could have obtained any general support. *

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* Extract from the Informe of D. Gaspar Jovellanos on the expediente upon the agrarian law presented to the Spanish Government on behalf of the "*Sociedad Patriotica*" of Madrid to which the Expediente had been referred for its DICTAMEN.

"If individual interest is the chief cause of the prosperity of agriculture, without doubt no laws can be more opposed to the principles of the Society (the Patriotic Society of Madrid) than those which in place of multiplying, have diminished this interest, diminishing the quantity of individual property, and the number of private proprietors. Such are those which by a species of political indolence have left without owners, and tenants a valuable portion of the tillable lands of Spain, and withdrawing them from private cultivation, have defrauded the state of all the product which private interest might have derived from them. Such are the *baldios*.

"The Society characterizes this abandonment with the name of political indolence, because they can apply no other more decorous to the prejudice which has respected them (the *baldios*). Its origin ascends even to the times of the Visigoths, who occupying and distributing among themselves two-thirds of the conquered lands, and leaving only one-third to the conquered, had to abandon and leave without owners all those which the population greatly diminished by the war, was insufficient to occupy. To these lands was given the name of *campos vacantes*, and these are for the most part, our *baldios*.

"The war which had first caused the population to decline, opposed itself afterwards to its natural augmentation, which found other still greater impediments in the aversion of the conquerors to agriculture and every species of industry. These barbarians knowing only how to fight and to sleep, and being incapable of the toils and application which agriculture exacts, preferred the rearing of cattle to the gathering of crops, and pasturage to the cultivation of the soil. The consequence was that the *campos vacantes* would be respected as reserved for common pasturage, and the increase of the herds. and of this rude policy we find repeated evidences in our *Fuero Juzgo*.

"This legislation restored by the kings of Asturias from the time of Alonso the Chaste, adopted on the part of the Crown of *Leon* by Alfonso V., transferred afterwards to Castile and observed until the time of San Fernando. the same rural system was diffused through all parts, respected the more in the middle ages, as the character of those times had deviated less from that of the Goths, and the enemy being in the very heart of the empire, and almost always in sight, it became necessary to look to the flocks principally for subsistence, and increase the public wealth by means of an enterprize least exposed to the fate of arms. Even after the conquest of Toledo, the frontier territories which extended along Extremadura, Mancha, and New Castile, were more pastoral than agricultural, and their herds fed more upon common and open lands, than in private pastures, and meadows, which could no more be protected than the cultivated fields.

"The Moors having been expelled from our continent, the *baldios* ought to have been reduced immediately to cultivation. Public policy and charity cried out, the one to the other, for the increase of means of subsistence, which the augmentation of population made more and more necessary, but between them both, they took a direction altogether contrary to each other. Policy, finding deep-rooted the direful system of pastoral legislation favored it so exorbitantly that it made the *baldios* an exclusive property of the herds; and charity looking upon them as the patrimony of the poor exerted itself in preserving them for their use; neither the one nor the other having re-

§ 56. This law provides for the reduction to private dominion of all the *baldios* [free lands] and other *terrenos comunes* [common lands] called also *terrenos realengos* [royal lands, for such they were] as well as those pertaining to the *propios* and *arbitrios* of the towns, not only in the Peninsula [of Spain] but in the provinces beyond sea except the *ejidos* necessary to the towns, [art. 1]. The lands of *propios* and *arbitrios*, or rather the use of them, were recognised as the legitimate property of the towns, that is of course, where the town could show a title for them, [see *ante*, § 40–51], and consequently although the dominion remained in the sovereign, while the usufruct was vested in the towns, [see *ante*, § 46], the revenues which they had been accustomed to derive from them were to be compensated and supplied by some means to be proposed by the provincial deputations and approved by the *Cortes*, [art. 1], or in case the *suerte* to be given to a resident citizen should, for want of sufficient lands among the *baldios*, be assigned out of the *propios*, then a redeemable quit rent was to be imposed, equal to what the same *suerte* of land would yield annually during the five years endwith the year 1817, [art. 15]. The towns are not regarded as having any direct interest whatever in any otherlands, nor is any compensation provided. They are all to be alienated, the one half on account of the national debt, [art. 6], a portion of the other half as a reward to, and provision for, the support of the officers and soldiers of the army, [art. 9 and 10], and the remainder by way of *repartimiento* [distribution] among the citizens of the respective towns, who may be destitute of landed property, and shall petition therefor, [art. 15].

§ 57. The law is certainly treating of the *lands in towns*, which is the situation of all lands in Spain, because it is provided in art. 3d, that in the alienation of said lands, a preference shall be given to the citizens and *commoners* "of the *pueblos en cuyo termino existan* [in whose limits or jurisdictional domain they exist], and in art. 6th, that in the hypothecation of the half of the *baldios* and *realengos* of the monarchy excepting the *ejidos* [for they are realengos—royal lands also], a preference shall be given to those claims which may be held against the nation by the citizens of those *pueblos a que correspondan los terrenos* [to which the lands appertain], and in art. 7th, that in the alienation on account of the public debt of this half of the *baldios y realengos*, or the part which it may be

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flected, that making the enjoyment of the *baldios* common, it was but natural that the rich rather than the poor would reap the benefits, and that it would be wiser policy and greater charity to found upon them a treasure of subsistence by which to save from misery a great number of poor families, than by furnishing, in their common enjoyment, food for the cupidity of the wealthy graziers, and a useless resort for the indigent.

"Those who have aimed to secure the multiplication of stock by means of the *baldios* have greatly deceived themselves. Reduced to private property, *cerados* (shut up against the right of common) tilled, and seasonably improved, would they not produce more abundant pasturage, and maintain a considerably greater number of cattle.

"It will be said, that then, all would engage in agriculture, and in the same proportion, the number of cattle would be diminished. This proposition is not certain, for it can be demonstrated that the *baldios* reduced to private property and converted to the uses of pasturage and tillage, would admit of cultivation to a great extent, and maintain at the same time a number of cattle equal to, if not greater than at present. But suppose for a moment that it should be so; can it be denied that the nation which abounds in men and productions, is richer than that which merely abounds in cattle?

"If it should be feared that the price of meat, an article of primary necessity, would, take an extraordinary rise, let it be reflected, that when meat is dear, private interest will naturally be directed to the subject, and in that case, will not the rearing of cattle be preferred to cultivation from this very circumstance, without any other stimulus? So certain is it that the equilibrium which is to be desired in this matter is established better without laws than with them.

"These reflections will be sufficient to demonstrate to your Highness the necessity of decreeing the alienation of all the *baldios* of the kingdom. What a fountain of wealth would not this single measure lay open, when these extensive and fertile lands being reduced to private property, and the activity of individual interest being employed upon them, they shall be settled, cultivated, stocked with cattle, and produce in pasturage and husbandry to the utmost of their capacity!"

After discussing various details as to the mode to be adopted in the alienation of the common lands, the quantity to be assigned to a single individual, and the conditions of the alienation in particular cases, all of which would depend upon the peculiar circumstances of each Province, and the abundance or limited extent of these lands therein, the report proceeds:

"In fine, sir, the Society believes, that in the execution of this measure, no *general* rule will be suitable: that the execution of it ought to be preceded by the investigations necessary to accommodate it not only to each province but likewise to each territory (tract of country): that the execution being encharged to the Provincial *Juntas* and the Ayuntamientos under the direction of your Highness, would be carried into effect with prudence and impartiality, and finally that the most urgent is to decree the alienation immediately, in order to proceed to the rest. Let your Highness, then decree this beginning, and the good will have been accomplished." (See also Escriche Diccionario de Legislacion, title BALDIOS.)

deemed necessary to hypothecate, a preference shall be given in the purchase, to the citizens of the respective *pueblos* and the *commoners* [who had to that time been] in the enjoyment of the said lands, and that in payment for the same, will be received at the par value, the claims which they may hold properly liquidated, for supplies to the national armies or loans made for the war since the first [which of May, 1808; and in art. 10 that the *suertes que en cada pueblo se concedan* in each pueblo may be granted] to officers or soldiers shall be equal in value, in proportion, &c.; and by art. 11th, that the *señalamiento* [designation] of these *suertes* [to officers and soldiers] shall be made by the Constitutional Ayuntamientos of the *pueblos a que correspondan las tierros* [to which the lands correspond or appertain] wirhout exacting from the parties interested *any costos* [expense] or *derechos* [fees] whatsoever, and that the *expediente* thereupon to be formed, shall be remitted in continuation, to the Provincial Deputation to be approved or modified; and in art. 15 that of the same remaining portion of *baldios y realengos* there shall be assigned *gratuitously* and for *once only*, by lot [*sorteo* from which comes *suerte*] a *suerte* [allotment] to each citizen of the respective *pueblos*, who may petition therefor; and by art. 17, that the *dilligencias* [initiatory steps and proceedings] for these concessions shall likewise be taken by the Ayuntamientos [that is of the respective towns in which the lands are] without any expense whatever, and shall be approved by the Provincial Deputations.

§ 58. It is scarcely necessary to observe that the intervention which the Constitutional Ayuntamientos are to have in the designation of the lands, or the pointing them out, and locating them, for all the various classes of pretendants, as officers, soldiers, settlers, vendees, and public creditors wishing to receive lands in satisfaction of their claims, is only that which is delegated by the government to the subordinate political authority most competent from their local knowledge and position, to discharge the duties assigned them; an intervention which was given by L. 5, 6 and 8, T. 12, Lib. 4, R. I., in all cases of the *repartimiento* [free distribution] of lands, and which I conceive is still requisite under the colonization law of 1824, and regulation of 1828, in places where such local authority exists, whatever irregular practice may have existed to the contrary.

§ 59. One observation in regard to the *Egidos*, which are excepted from the sale, hypothecation and distribution to be made under this law of 1813, not because they were not *baldios* and *realengos*, because in Art. 6, they are, constructively, at least, included in that denomination, but excepted out of the half to be reserved to be hypothecated on account of the national debt, as they are likewise excepted from the general provisions of the first article. "Without prejudice to what is provided," [in the preceeding articles] "there is reserved the half of the *baldios y realengos* of the monarchy excepting the *ejidos*," &c, by which it may fairly be inferred that the *ejidos* were considered as included in that denomination.

The first article provides generally, for the reduction to the class of private property, of "all the *terrenos baldios o realengos* and of *propios* and arbitrios, wooded and not wooded, as well in the Peninsula and islands adjacent, as in the provinces beyond sea—*except the ejidos* necessary to the *pueblos*. The ejidos are certainly not excluded from the denomination of *propios* and *arbitrios* from the very character and description of this class of property, [see ante § 23 to 28] and they must consequently be included in the denomination of royal lands which remained *baldios* [free to all]. The lands of propios and arbitrios were *acotados* and *cerrados*—inclosed for private use, and by means of cultivation, pasturage or other private use, for which they were rented out, yielded revenue to defray the the municipal expenses. The *propios* in short consist of "that *property* which by some *title* belongs to the *comun* of each pueblo and the revenues whereof are destined to the preservation of the civil State, and municipal establisments," [1 Feb. 304—5 and ante § 25]. But the *ejido* yields no revenue. "It is the *campo* [open country] which is at the *salida* [exit] of the *cities*, *pueblos* and *lugares*, and which is not planted or cultivated. Its extension according to the law [L. 13, T. 7, Lib. 4, R. I.] ought to be as great as may be necessary, so that in case the town [*poblacion*] grows, there will always remain space enough for the people to recreate themselves, and let out their cattle without doing damage. From which it is clear that no fixed rule can be given, but that it must be altogether arbitrary, according to the circumstances of the magnitude of the cities, number of inhabitants, &c." [1 Feb. Mej. 312–13.] The author just cited divides the *bienes de universidad* into two classes in the first of which he ranks the *propios* and arbitrios, "which cannot be used by all, and which are only *administered* by the *ayuntamiento* or council of the city, and the fruits whereof are dedicated to the public utility," [ib. 304] and in the second class the ejidos, [ib. 312] which are for the common use of all the dwellers of that place, as well of the poor as the rich, but which cannot be used by those of any other *tierra* [place or town] contrary to their will or prohibition;" [ib. 304, 312, vid. L. 9, T. 28, P. 3.] and that exclusive right is founded, in the absence of any special grant, other than a mere political designation, upon the division of territory for political purposes, as may be inferred from the following words of Gregorio Lopez in note 10, referring that part of the law of the Partidas which is above cited in the words of Febrero: "*et recté nam divisio territorio hoc inducit,*" and the construction of it given by Febrero; "*cuyataxitiva dice Erpez, la induce la division del territorio*" [which restriction, says Lopez, is founded on the division of the territory]. If the observations of Gregorio Lopez on the words "*son establecidos,*" used in this law of the Partidas, which I have already transcribed, [ante § 51] be considered as repeated here, I shall have no more to say about *ejidos* at present; observing generally, that after the decree of the Spanish Cortes of 4th Jan. 1813, there remained no town commons distinct from *ejidos* in any Spanish country, where, as in Mexico, this law remained in force. In Spain itself, the radical reform which it proposed was not at once carried out, but the project was several times suspended, and again ordered to be carried into execution. While this law remained in force, however, in consequence of the royal decree of 15th April, 1820, Mexico became independent, and although, upon the restoration of the absolute government in Spain, in 1823, its execution was again suspended there for a time, this did not affect its operation in the Mexican Republic, where it has always been considered as remaining in full vigor.

§ 60. The town commons in Spanish countries were all the lands public and private, embraced within the *termino* or demarcation of the municipality, except those which by special authority from the Sovereign, were *acotados* and *cerrados.* The decrees of 4th January and 8th June 1813, destroyed the whole system. The former authorized the sale and distribution of the *royal lands* in the towns, and the latter, allowed individual owners to inclose and use their own lands to the exclusion of all others. There remained after this, no commons to towns, which might not at any time be disposed of by the sovereign proprietor. The laws which permitted the citizens to use the public lands in common, remained in force, but the ancient system which proposed the reservation of them for this purpose, was abolished, and the lands were, in accordance with the new and wiser policy, to be reduced to private dominion as quickly as possible: (see report of committee on agriculture in the *Spanish Cortes* on this subject, 12 Diario de Cortes p. 99, see post § 109.)

§ 61. In continuation of my reasons for the several propositions hitherto maintained, and which for the sake of brevity I refrain from repeating, reference will now be had more particularly to the legislation of the Indies and of the Mexican Republic, which has, or has been supposed to have some material bearing upon this subject. Most of my efforts thus far have been employed in clearing away rubbish—in correcting and refuting what I conceive to be errors, so that the truth, which in this case, is very simple, may not be obscured by them. This part of my task is not yet finished, but in the farther prosecution of it, I beg the attention of the Board in the first place, to some laws, regulations and orders supposed to be applicable, but which in truth are not so. Such are *ordinanzas* 88 and 89, 100 and 101 *de poblaciones*, first promulgated in the royal statute under that title by Philip II. in the year 1563, and which articles were afterwards inserted in the Recopilation of the Indies published in the year 1680, and constitute laws 6, 7 and 10, Tit. 5, Lib. 4, which I will translate.

§ 62. L. 6. "If the situation of the country [tierra] renders it suitable for the settlement of a *villa* of Spaniards with a council of ordinary *Alcaldes* and *regidores* and there be some person who will take *asiento* [contract] to settle it [*poblarla*] let the *capitulacion* be made with these conditions [*calidades:*] that within the time that to him may be assigned, it shall have at least thirty *vecinos*, and each one of them a house, ten breeding cows, four oxen, or two oxen and two steers, [or young unbroken oxen, whether steers or bulls,] one breeding mare, one breeding sow, twenty breeding castilian ewes, and six hens and a cock; he shall likewise appoint a clergyman to administer the holy sacraments, who shall be for the first time of his election, and afterwards according to our royal patronage, and he shall provide the church with ornaments and things necessary for divine worship, and give security that he will fulfill within the aforesaid time; and if he do not fulfil, let him lose that which he may have built [*edificado*] wrought [*labrado*] and gained [*grangeado*] which we do appropriate to our royal patrimony, and moreover let him incur the forfeiture of a thousand pounds of gold for our exchequer [*camara*]; and if he do fulfill his obligation, let there be given him [*se le den*] *termino y territorio*, four leagues square. [*cuatro leguas de termino y territorio en cuadro*] or prolonged according to the situation of the country in such form that if it be measured, there shall be [in quantity] the four leagues square [*sean las cuatro leguas en cuadro*] with the condition that the limits of the said *territorio* be distant at least five leagues from any city, *villa* or Lugar of Spandiards which may have been previously settled, and no prejudice be occasioned to any Indian Pueblo, or private persons."

§ 63. L. 7. "There being one who will obligate himself to build up a new town [*hacer nueva poblacion*] in the form prescribed, with more or less than thirty *vecinos*, provided they be be not less than ten, let there be granted granted him the *termino y territorio* in proportion [*al respecto*] and with the same conditions."

§ 64. L. 10. "Whenever any private persons agree among themselves [*se concordaren*] in the purpose of building up a new town [*en hacer nueva poblacion*] and there shall be a number of married men for that purpose, let license be given them, [*se les de licencia*] provided they be not less than ten married, and let there be given them [*deseles terminio y territorio* in proportion as aforesaid [*al respecto de lo que está dicho*] and we grant them authority to elect from among themselves ordinary *Alcaldes* and officers of the annual council." [See also "regulation and instruction for the Presidios which are to be established on the frontier line of New Spain—established by the King 10th Sept. 1772," Tit. 12. It is found in Arrillaga Recop. for 1834, p. 139—also order and instruction from the comandante dated 22d March 1791, Rockwell 451.—also Viceroy's instruction of 17th Aug. 1773, 1 Rockwell 444, all of which are equally inapplicable and irrelevant to this case.]

§ 65. These laws are of no assistance either for or against the claimant, because,—

1. They did not remain in force in Mexico after its independence.
2. They are wholly inapplicabe to the subject.
3. They do not establish, nor tend to establish the rights contended for.
4. They do not militate against any one of the propositions which I have advanced.

The meaning of a law is to be determined according to the intention of the Legislator, which is to be ascertained not arbitrarily, but by the application of certain fixed rules of interpretation, among which is one very evident and reasonable, that reference must be had to the context and the cotemporaneous facts, [1 Feb. Mej. 17.]

§ 66. The code entitled "*Recopilacion de leyes Indias*," is not a new statute, or collection of new statutes thus first promulgated. If it were so, we should have only to read it consecutively from beginning to end, in order to comprehend the just interpretation that ought to be given to any one of the distinct provisions inserted in it, and which for convenient reference is set down distinctly in the appropriate book and title. But this code is just what it purports to be, a Recopilation, a compilation, made up of many old laws, statutes and ordinances, for the government of the kingdoms of the Indies, made and promulgated at various distinct periods, during the transcourse of about one hundred and eighty years. The compilation was made by various learned advocates and published by authority of the King, who in a decree of 18th May 1680 declares what authority it is to have. But the laws inserted in it are for the most part, old laws, which had already been in force, for a long period, and these laws collected together and inserted, are not changed or modified any further than it is so declared by some posterior disposition, nor is the just construction which ought to be, and was put upon them, and which is deduced from their eviden intention and import in any manner altered by their insertion in this code.

The laws, which I have just translated, are parts [arts. 88, 89, 100 and 101] of one entire statute, consisting of several hundred articles, enacted and promulgated in the year 1563, by Phillip II, under the title of "*Ordinanzas de Poblaciones*," and consequently. had already been in operation one hundred and seventeen years, when the Recopilacion was promulgated as a code.

At that early period, nearly the entire continent of the two Americas was yet undiscovered and unsettled, nearly all of which, with the adjacent Islands, and the Philipines, were claimed as comprehended in the dominions of the King of Spain. It was about forty years after the brilliant conquest made by Cortez in that portion of the country which has erected into a distinct kingdom with the name of New Spain. It was two hundred and six years before the epoch in which the first white inhabitants, under the guidance of Father Junipero, and the military escort of the Governor and Comandante D. Gaspar de Portalá, with D. Fernando Rivera y Moncada, second in command, and Lieutenant D. Pedro Fages, with a considerable force by sea and land set foot upon the soil of Upper California. The whole continent with the exception of a few scattered white establishments, supported by force of arms, in which the several subordinate governments then existing, resided, was in the possession of numerous and powerful tribes and nations of Indians. These vast regions wero to be explored and settled. It was out of the question to expect that individual settlers, for the sake of finding land to to cultivate, would venture, unprotected, out of the reach of the guns of the Spanish Forts. Neither could any discoveries be undertaken at the expense of the Royal Treasury, nor any sums be expended for that purpose by any of the Viceroys or other functionaries in the Indies, without special authority from the king, even though they might be authorized to make discoveries, a prohibition which was incorporated in the ordinance of 1563, [art. 25,) which is to engage our attention, and of which the laws just cited constitute a part.

It was principally for the purpose of engaging individual enterprise, and private capital in the exploration and peopling of this vast continent, and the development of its mineral wealth, then known to be inexhaustible, that the "*Ordinanzas de Poblaciones*." were framed.

§ 67. It is provided in the first article [L. 4, T. 1, lib. 4, R. I.] that no person of whatsoever quality or condition, shall make any new discovery on his own authority, either by sea or land, nor establish any new *poblacion* (town or settlement) in the parts discovered or to be discovered without license from the king, or some one who is empowered by the king to grant it; and the Viceroys, Governors, and other officers are forbidden to grant such license, unless *especially* authorized, but they are allowed to give license for founding *poblaciones* in those parts within their *jurisdictions*, which have been explored and reduced, making report to the king immediately.

§ 68. In Art 2 it is provided that the superior functionaries, spiritual and temporal in the Indies, shall diligently ascertain whether in their districts or the countries and provinces coterminous therewith, not being under the government of others, there be any parts to discover and *pacify*, what number of people and nations inhabit the same and of the character of the land without sending warlike people or others who by their reprehensible conduct towards the natives, may scandalize the christian faith; and having informed themselves on these points by the best means in their power, and also of the most suitable persons to prosecute the exploration, they are permitted to enter into a contract, observing in framing it the laws respecting discoveries, and offering to such persons the honors and advantages which justly and without injury to the natives they may, and of all they may have ascertained and contracted, without putting it into execution, they are to make report to the vice-roy and through him to the Council of the Indies, in order that being seen and considered therein, the royal license may be given, if the discovery be deemed proper. (L. 1, T. 3, Lib. 4.)

The succeeding eighteen articles contain minute regulations respecting the kind and number of ships to be employed in each expedition, the manner in which they are to be equipped, manned, apparelled and provisioned, goods and trinkets which are to be taken on board for the purpose of traffic with the Indians, the minute account that is to be kept of all that is discovered and observed on sea and land, the conduct to be observed toward the natives and the time when the ships must return.

§ 69. Articles 21 and 23 provide that those who shall have gone forth on voyages of discovery by sea or land by *capitulacion* (contract) made in the Indies, must return to make report (dar cuenta) to the government or audiencia with which they may have contracted (*capitulado*) which government or *audiencia* is to send an extended and complete relation of the discoveries and the results to the Council of the Indies; and that if the *discubridor* (the person contracting for making the discovery) possesses the necessary requisites, he may be encharged with the enterprise of settling the country discovered, or he shall receive the reward which he may merit for his labor and expenditures, having fulfilled his contract (*asiento*,) (L. 14, T. 1, Lib. 4.)

§ 70. In every expedition a journal is to be kept and read daily, before the whole company, and finally presented to the Council of the Indies, or in the audiencia where the report is to be made (Art. 22.) Indians are not to be taken from the parts discovered, except for interpreters and going voluntarily (Art. 24.) No discovery to be undertaken at the King's expense, (Art. 25.) The persons charged with making discoveries, are to be those of approved christianity, good conscience and zealous for the honor of God and the King's service; lovers of peace, and desirous for the conversion of the Indians, so as to satisfy the obligation which the King acknowledges himself under to see that the thing is done with all christian prudence, love and moderation (Art. 27.) Foreigners and other persons prohibited to pass to the Indies cannot be employed in discoveries, nor go out with the expeditions (Art. 28.) The word *conquest* is to be dispensed with in all *capitulaciones*, and in its place the words *pacificacion* and *poblacion* are to be used, so as to afford no pretence for committing outrages against the Indians, (Art. 29.) The discoverers must observe the laws and the special instructions given them which are to be reasonable, and adapted to the character of the country they go to discover and the nations which inhabit it, (Art. 30.)

§ 71. No discoverer, nor *Poblidor* (contractor for the settlement) can enter into the district encharged to others, or which may be already discovered, in order to make settlements (*poblar*) or discoveries there, (Art. 31.) Articles 34, 35, 36 and 37 (L. 1 and 2, T. 5, Lib. 4,) speak of the circumstances which are to be observed by the *pobladores* in selecting locations for new settlements in cases where it should be resolved to settle any province or district among those already reduced, or which should thereafter be discovered.

§ 72. Article 39 and 40, (L. 1, T. 7, Lib. 4,) "Having made the discovery by sea or land, according to the laws and orders which treat thereof, and having selected the province and district (*comarca*) which is to be settled and the site (*sitio*) of the places (lugares) in which the new *poblaciones* are to be founded and contract therefor being made (*tomando asiento sobre ello*) those who are going to fulfil the same shall observe the form following, &c. "The site is to be elevated and healthy, and selected with a view to the shelter, capacity and defence of the Port—and from places which are vacant and can be occupied without injury to the natives or with their free consent. When the plan of the place is made, it is to be divided into streets and squares, and *solares*, commencing with the *Plaza Mayor* and extending the streets to the gates and principal roads, and leaving so much open space (*campo abierto*) that should the poblacion go on greatly increasing, it can always extend in the same form—care is to be taken to have water near by which can be conducted to the *Pueblo* and the lands. Places very high or very low are to be avoided, and those of medium elevation selected for settlement, which may enjoy the North and South winds. Mountain ridges and hills if they exist, should fall on the East and west, and care is to be taken to avoid places subject to fogs. Sites for Pueblos are not to be selected in uncovered, maritime places, for the danger of Corsairs—and because they are not generally healthy, and for the additional reason that there the people will not dedicate themselves to tillage and agriculture; nor will their morals be so well formed, unless it be when there are some good and principal ports, and of these only may be settled (*se pueblan*) those which may be necessary for the ingress to (*entrada*), commerce, and defence of the country." (Art. 41, L. 4, T. 7, Lib. 4.)

§ 73. Art. 43 (L. 2, T. 7, Lib. 4,) is as follows:—"The country (*tierra*) province and place being selected in which is to be erected the new *poblacion*, and the circumstances and advantages thereof being ascertained, the Governor in whose district it may be, or on which it may confine, will declare the pueblo which is to be settled (*que se ha de poblar*) and conformably to what he may declare shall he formed, the council, republic and offices thereof; so that if it be a metropolitan city it may have a judge with title of *adelantado*, *alcalde mayor*, or *corregidor*) or ordinary alcalde, who shall exercise the jurisdiction *insolidum* (entirely) and jointly with the (*regimiento*) council, have the administration of the Republic; two or three officers of the Royal Hacienda; twelve *regidores;* two *fieles ejecutores;* two *jurados* of each parish; one procurador general: one mayordomo; one *escribano* of the Council two *escribanos publicos*, one of mines, and one of registries; one chief crier (pregonero mayor;) one exchange broker; two porteros (summoners;) and if it be diocesan or sufrigan city, eight *regidores*, and the other permanent officers; for the *villas* and lugares, an ordinary alcalde, four *regidores*, one *alguacil*, one escribano of the council, one *escribano publico*, and one mayordomo." It must be observed, that this article empowers the superior authority of the proper district or province to declare what is to be the class and character of the *pueblo* which is to be founded and built by the Poblador referred to in the previous articles 39 and 40, whether it shall be a metropolitan or diocesan city, a *villa* or *lugar*, in order that the municipal government may be organized in conformity therewith; but it does not empower him to confer the *title*, much less to grant any privileges, exemptions or property. That could only be done by the king himself, to whom *immediate* account was to be given, as prescribed in Art. 1. (ante § 67.) At least if it may be construed to embrace the authority to confer such title, it is so far abrogated by the subsequent law of 1627 which is L. 6, T. 8, Lib. 4, R. I., before cited (ante § 29) by which that power is expressly denied to any viceroys, audiencias, governors or other ministers of the Indies, however superior in authority. The form of the contract and the conditions of it under which this pueblo must be founded and built, are specified restrictively in other articles of the ordinance. The succeeding articles, 46, 47, 48 and 50 (L. 18 and 19,, T. 7, and L. 3 and 4, T. 5, Lib. 4) relate to the description of persons that are to be admitted to the company, or list of colonists which are to be taken out as settlers for the new towns to be founded, the appointment of municipal officers, payment of their salaries, registry of the names of the settlers, and the capital which each is to employ in the adventure.

§ 74. The articles which follow from the 50th to the 87th, exclusive, relate to discoveries, pacifications and settlements of countries and districts, not included in nor immediately bordering upon the district of any viceroy or royal *audiencia* by whom it might be conveniently governed, to be undertaken by some great capitalist at his own expense, by treaty made directly with the king with the title of *adelantado cabo principal* or *capitan*. The *adelantado* was invested with the superior government and jurisdiction in the provinces which he undertook to people, and was subordinate and subject to no authority but the king and supreme council of the Indies. If he discharged his undertaking in such a manner as to merit the royal approbation, he was to have the plaudit of "well done, good and faithful servant;" and thenceforth take rank among the first nobility of the old kingdom, (Art. 52, 86, 68, 69, 84, L. 2, 14, 15, 23, T. 3, Lib. 4); all of which, however, was to be regulated by contract. Among other articles (*capitulos*) to be inserted, one was that within a certain time to be specified, he should have erected, founded, built and settled, at least three cities and one province of *Pueblos Sufriganeos*. If he should contract to construct fortresses—he was to have the tenancy of them for the time, limited or perpetual, which might be conceded to him, his son, heir or successor, with competent salary from the royal treasury, or products of the country. (Art. 53, 54, 55 and 60, L. 8 and 9, T. 3, Lib. 4.)

He might establish weights and measures for the precious metals in the *Pueblos* of Spaniards, settled or to be settled, (L. 12, T. 3, Lib. 4, Art. 63.) In defect of officers of the royal *Hacienda*, he might appoint them *ad interim* (Art. 64, L. 11, T. 3, Lib. 4). He might draw upon the royal treasury for any sums that might be necessary to repress any rebellion (Art. 65, L. 18, T. 3, Lib. 4). He might make ordinances for the government of the country and working of the mines, provided they were not contrary to law, and were confirmed by the Council of the Indies (Art. 66, L. 17, T. 3, Lib. 4). He might divide his province into districts, and appoint judges and other officers, assigning them competent salaries from the products of the country (Art. 67, L. 16, T. 3). He was himself to exercise the jurisdiction, civil and criminal, in grade of appeal from the Lieutenant-Governors, and the ordinary Alcaldes of the cities and *villas* which he founded, and this jurisdiction was transmissible to his son or heir, or successor in the government (Art. 68, L. 14, T. 3, Lib. 4). As the said *adelantado* or *cabo principal* was next subordinate to the Council of the Indies, no one of the viceroys nor coterminous *audiencias* were permitted in any manner to *intermeddle* with the affairs of his province (Art. 69, L. 15, T. 3, Lib. 4). If he found any judges already appointed in the province embraced in his *Capitulacion* on his arrival there, they were to cease acting immediately, and depart the country, unless they wished to stay as simple settlers (Art. 70, L. 13, T. 3, Lib. 4). He might appoint *regidores* and other officers of the *Pueblos*, which should be newly settled, provided the king had not appointed them, and those appointed by him must be confirmed within four years by the king (Art. 72, L. 10, T. 3, Lib. 4). If he contracted in Spain, and proceeded thence, royal *cedulas* were dispatched in his favor, allowing him to raise men and provisions, without any hindrance or interference on the part of any of the public authorities, and without giving them any account of the persons going out in his company, all of whom when once enlisted were to follow, adhere to, and obey him, without separating themselves from the adventure and going on any other voyage, on pain of death, (Art. 73, 74, 75, 76 and 77, L. 3, 4 and 6, T. 3, Lib. 4.) He was exempt from the payment of all duties on slaves, provisions, and supplies carried out for the subsistence of himself and the settlers under his orders for the period of ten years, and from the payment of *alcabalas* for the period of twenty years (Art. 78, 79, 81, 82, L. 7, 5, 20, 21, T. 3, Lib. 4). An account was to be taken of his official conduct (*residencia*) as in case of all other principal public functionaries, and if he had fulfilled, as he ought, his *asiento* (contract) he was to be commended as a faithful servant, and receive a grant of vassals in perpetuity and the title of Marquis or some other wherewith to honor his person and house (Art. 83 and 84, L. 22 and 23, T. 3, Lib. 4).

§ 75. It is next provided (Art. 87) that whenever discovery, pacification, or *poblacian* (settlement) is to be made of a province bordering on, or included in those of any viceroy or *audiencia* by *capitulacion* with a viceroy or *audiencia* or person in the Indies empowered to make it (the contract), it shall be conceded with the title of *Alcaldia Mayor* (superior Alcaldeship) or *corregimento* (corregidorship) by way of colony of some city of the Indies or of these kingdoms, or by way of *asiento* (contract) with title of Alcaldia Mayor or *carregemiento:* and to the *Cabo* who may contract shall be conceded the same as to the *adelantado*, except in all things touching the government, he is to be subordinate to the viceroy or *audiencia*, in whose district his may be included, or on which it may border, &c.

§ 76. The next two articles constitute the law which I have already cited, (ante § 62) and relates to the settlement not of "*any town*," as White's translation has it, (2 White, Recop. 44,) but of a particular class or *corporate* town—a *villa* which *per se*, and not as a dependency of some other place—possesses jurisdiction, honor, district, &c., (1 Comp. del Derecho Publico de España 340,) and the title and privileges of which, "the King or Sovereign Prince alone, has power to concede" (ib. 339.) It speaks of a concession to be made to the contractor for building up and settling the place which is to constitute the future *villa*, of a *termino y territorio*, not "four square leagues," as White has it, but *four leagues square*, (*cuatro leguas en cuadro*,) and not of the location of the land in such form that "when it be located and surveyed the four leagues shall be in a quadrangle," as White also has it, but in such form, according to the shape and circumstances of the country, that if it be measured, there shall be *in quantity*, the four leagues square comprehended in the boundaries assigned, (*sean las cuatro leguas en cuadro.*) This, however, depended upon the *capitulacion*, and a strict performance on the part of the contractor; for if he failed to fulfill as he ought, he not only got no *grant*, but lost all the labor and capital which he had expended, unless an extension of time was obtained as provided in 93, art. L. 25, T. 7, lib. 4.)

§ 77. Neither was the *termino y territorio*, when granted, to constitute his private property, but was to be distributed as follows: [art. 90, L. 7, T. 7, lib. 4:] *first*, was to be taken out whatever might be necessary for [not the indefinite thing called "site of the town," as White translates, but] the *solares* of the *pueblo*, a competent extent for *egido* and *dehesa* which must lie adjoining it, [art. 130, L. 14, T. 7, lib. 4,] sufficient to pasture abundantly the stock which the citizens admitted as first settlers, were required by the preceding articles 88 and 89 to start with, and as much more for *propios* of the place. The remainder was to be divided into four parts, one of which the contractor was to select for himself. The other three parts were to be divided into equal *suertes*, equal in number to the *salares* [art. 130], which *salares* and *suertes*, after assigning to each of the first settlers those which they were to have for their respective private use and property [vid. art. 103, L. 9, T. 5, Lib. 4,] were to remain the property of the King, to be by him granted to such as might afterwards come to settle [arts. 127 and 130, L. 11 and 14, T. 7, Lib. 4.] The contractor might entail that part of *termino y territorio* which fell to his share, as well as the mines, &c. on it, [arts. 96 and 97, L. 24, T. 3, Lib. 4,] which power to entail property could only be exercised by special royal privilege, [19 *Teatro de Legislacion*, p. 433, L. 2, T. 17, Lib. 10, N. R.] and was to have, if so agreed, the jurisdiction, civil and criminal, in first instance, for the period of his own and the life of one child, or heir, with power to appoint ordinary *alcaldes*, *regidores*, and other officers of the council of the same *pueblo* [art. 95, L. 11, T. 5, Lib. 4.] If he took his colony from Spain, he and those accompanying him as settlers for the new town, were to be exempt from all duties and royal imposts on the things which they took for their houses and subsistence in their first voyage to the Indies, [art. 98, L. 2, T. 6, Lib. 4;] and finally says art. 99, which is L. 6, T. 6, Lib. 4. "In order to honor the persons and legitimate children and desecendants of those who may obligate themselves to build up a town [*los que se obligaren a hacer poblacion*,] and shall have concluded and fulfilled their *asciento*, we make them *Hijosdalgo de solar conocido*, so that in that *poblacion* and all other parts of the Indies, they may be *Hijosdalgo*, and persons of noble lineage, and *solar conocido*, and for such be deemed and held; and we grant them all the honors and pre-eminences which may of right be had and enjoyed by all *Hijosdalgo* and *Caballeros* of these kingdoms of Castile, according to the laws, usages and customs of Spain."

§ 78. *Capitulaciones* were to be admitted on these conditions, and with the offer of all these advantages and pre-eminences, with such others not inconsistent with this ordinance, or the laws of the kingdom, as might be agreed on, with any one possessing the requisite qualities and capital, and able to give approved security for his compliance, who could furnish at least twelve settlers for citizens of the new place to start with, and the *termino y territorio* to be assigned was to be in proportion, whether the number should be greater or less than thirty.

§ 79. If a number of married men, not less than ten [ante § 64, Ord. 101, L. 10, T. 5, Lib. 4,] should agree among themselves to go to the new country and build up a town [*hacer nueva poblacion*] the proposal was to be admitted by the government, and besides the conditions stipulated in other cases, they were to have the right to elect from among themselves ordinary alcaldes and officers of the council. But this was also regulated by express contract, as all treaties for new settlements were to be, which are contemplated in the articles hitherto cited from the ordinance of 1563, (see arts. 39 and 40, 45, 46, L. 18 and 19, T. 7, Lib. 4,) which contract or *capitulacion*, as it was called, because it was drawn up with great formality, consisting of many *capitulos* (chapters or articles) constituted the law which determined the rights of all concerned. The next article following this (102) which is L. 20, T. 7, Lib. 4, referring to, and evidently intended to comprehend all the different modes and agencies for establishing and settling new towns which had been provided for in any of the preceding articles of the ordinance, ordains as follows:—

"*Asiento* for a new poblacion having been taken by way of *colony adelantamiento*, *alcaldia mayor*, *corregimiento*, *villa*, or *lugar*, let not the council, or those who may have contracted (que hubieren ajustado) in the Indies, not content themselves with having taken and made the *asiento*, but go on controlling it, and ordain that it be carried into execution and take account of what is being done."

§ 80. It is evident from the examinations which have been made that l. 6, 7 and 10, T. 5, lib. 4, R. I. (see ante §62 and 63-4) relate to the settlement of provinces or districts wholly desert and remote from those which had been already peopled, in which settlements could only be effected at that early period by enlisting private enterprise and private capital in these adventures, with the offer of advantages and rewards corresponding to the danger, expense and privations attending them. It is equally evident that these laws like many others relating to new settlements prescribe merely the bases which were to be incorporated in the contracts to be entered into with the government, and they can have no operation independently of the *capitulacion asiento* or express contract. If the last proposition be true, another as a consequence seems to me to result, namely, that these rules prescribing the matter and formalities of contracts to be made or declined by the government at its option, ceased to have any operation in Mexico when the authority of the government which prescribed them terminated; for they are not properly speaking laws which operated *per se* or which had taken effect except where they had entered into contracts already made. They were rules of action for the *Government* only, authorising it to make contracts which should comprehend them. It may be doubted whether after the Federal Government was established in Mexico, it could alienate the smallest portion of the national territory or other national property either in favor of individuals or corporations, except by virtue of the colonization law of 1824, or some other act of Congress. The prohibition is certainly contained in the Constitution of 1836 (4th Const. Law, Art. 18,) and in that of 1843, (Art. 89,) [see also note to l. 8, T. 21, lib. 7, N. R. in *los Codigos Españoles* V. 8. p. 502.] I shall not pursue this point however, as it is not necessary to my purpose. On some future occasion I may ask the permission of the Board to present some authorities upon it, which seem to me to be decisive. *In the absence of an express contract duly concluded in public form, these laws have no application, and when there is such a contract, the terms of it govern every thing.* Who is the Contractor? Who were the *Casados* that agreed among themselves to build up the new town [*hacer la nueva poblacion?*] In what city? before what Escribano Publico? and with what functionary duly empowered, was the contract executed? How many *Casados*, or how many *vecinos* were first stipulated for, and how many actually went to work on the new town? for the *termino y territorio* was to be in *proportion* to the number, in the proportion of four square leagues to thirty. Was it to be a city, *villa* or *lugar?* Within what time was the thing to be done, and was it completed according to contract? If it was peformed where is the report to the Government, and where is the *express grant* specifying the quantity or extent, shape, location and boundaries of the *termino y territerio* that was to be given? It could only be located either by the descriptive terms of the contract, or of the grant following its fulfilment, for the quantity was indefinite, depending upon the number of settlers, and the form of the tract, and its locality would depend on the topographical circumstances of the country. These questions being answered, we may ask again, where are the lands of the town, the *propios*, or property of the *Consejo?* Where are the *solares*, the Ejido, and the *dehesa*, confining with the Ejido? Where the *Suertes* of land equal in number to the solares? And where is the tract to be reserved as the exclusive property of the contractor or contractors? (vid. l. 6, 7, 9, 10, T. 5 and L. 7, 11, 13 and 14, T. 7, lib. 4. R. I.) The *town* had nothing but the *propios* which must be segregated from the rest by metes and bounds. The solares, and *suertes* not given to the first settlers, remained *valdios* for the king, the sovereign, to dispose of to new comers or otherwise according to his pleasure [L. 11 and 14, T. 7, lib. 4.] The Ejido remained the property of the Sovereign also, being nothing else but vacant space left, provisionally outside of the surveyed plat, which might subsequently be sub-divided in the same form as the original plat, by extending the streets, and laying out of new *solares*, if the increase of population should require it [l. 1, 13, 14, T. 7, lib. 4, R. I.] Again where are the private lands of the first setters, the *solares*, the tillable and pasture lands, the *suertes* or *peonias* and *caballerias* that were to be given them, with their locality and boundaries? So far as the *laws* operate, they establish the claim to these as far as they do the claim of the town to any particular tract under the name of *propios*, or any other denomination, [L. 9, T. 5, and L. 7, 11 and 14, T. 7, lib. 4.] If the settlers themselves should present themselves before the Board proving themselves to have been first settlers and nothing more—producing no express grant, would you find enough in these laws to establish a grant to each one for the portions of land claimed by him, and to determine the locality and boundaries of each portion? Would you have no occasion to refer to contracts, written titles, documents, public records or surveys? *

§ 81. While the learned counsel for the claimant are preparing to surmount these formidable difficulties, we will propose another for their consideration. *Sea Ports are expressly excepted out of the operation of the laws which we are discussing.* In article 92 of the ordinance, placed in juxta position with them, which is l. 6, T. 7, lib. 4, R. I., it is declared "*Territorio y Termino* for a new town, [*poblacion*,] can neither be granted nor taken by *asiento* in Sea Ports, nor in any parts which at any time can result to the prejudice of our royal crown, or that of the state [*republica*] for our will is that they remain reserved for us." *Territorio y Termino*—It is the identical expression used in each and all of the three laws which have so erroneously been supposed to give some support to the pretensions of the present claimant [l. 6, 7, and 10, T. 5, lib. 4]. "Let there be given him four leagues of *termino y territorio*" [l. 6]; "let there be granted him the *termino y territorio* in proportion" [l. 7]; "let there be given them [the *casados*] *termino y territorio* in proportion" [l. 10.] But in Sea Ports *Territorio y termino* can neither be granted, nor taken by *asiento*, for these places must remain reserved for us.

On the 17th of September, 1776, solemn possession was taken of the Presidio newly founded at the entrance of this Port, and on the 9th of October following, the mission was founded with the usual ceremonies, on the site which it yet occupies under the patronage of San Francisco (*Junipero* 210, 214).† The port was

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* The lands within the *termino y territorio* of four leagues which was to be assigned as limits were to be distributed in the manner specified in the laws already referred to and were not by any means to be given to the town, but was to be divided out and granted in distinct portions to the contractor, the settlers, the town, &c., and the lots and suertes not distributed to the first settlers were to be considered as the King's property, "for him to grant to those who should afterwards come to settle, or whatsoever his pleasure should be, (L. 11, T. 7, Lib. 4, R. I. Art. 4 and 5, royal regulation for California of 24 Oct. 1781. See also the Pitic Document dated Nov. 14, 1789, on file especially Art. 18, in which it will be seen that all the grants of lands and lots within the *termino* of four leagues to be assigned to that new town were to be made by the Royal Commissioner in his Majesty's name, and that no authority was to be given to the Ayuntamiento over any lands within the same *termino*, except the eight *suertes*, which by Art. 14 and 15 of the same document are to be assigned, marked out and designated with monuments for *propios*, or property of the town. The citizens were to enjoy in common the pasturage, wood, water, &c. on the vacant portions of the *termino*, as prescribed in L. 5, T. 17, Lib. 4, R. I. (vid ante §38) which is referred to in Art. 5 of this Doc. as the only foundation of, and defining the extent of the interest which the citizens would have in the natural productions of this *termino* of 4 leagues. See also the communication of the *Comandante* D. Jacobo Ugarte y Loyola, dated 21 June, 1786, on file, which in giving the reason why the *estancias* for cattle, ought not to be located within the 4 leagues which may have been assigned and marked out to a town, refers to the same L. 5, and those following of Tit. 17, Lib. 4, R. I. and the royal regulation of 1781, without intimating that the town would have any property in the lands embraced in said *termino*, but only that the citizens would enjoy the common pasturage, fuel, water, &c., as provided in the general laws of the Kingdom referred to.)

† This is the Mission founded for the Patron of the Order in Upper California. It was not included in the number of those originally projected, and the circumstances under which it was established were somewhat curious, as may be seen from the following account of Palore in his *Historical Relation of the Life and Apostolic labors of the Venerable Father Fray Junipero Serra:*

"The 24 day of January, 1770, returned to San Diego the land expedition which had started out on the 14 July of the year before, having spent six months and ten days and suffered many hardships (as my beloved Father and fellow disciple Fr. Juan Crespi relates in his diary), bringing the unwelcome intelligence of their failure to find the Port of Monterey, in which had been anchored the Maritime Expedition of Admiral Sebastian Vizcaino, in the year 1603, in the time that the Count of Monterey was Vice-roy of New Spain, and that they had arrived at the Port of our Father San Francisco, forty leagues further to the North.

"Father Fr. Juan Crespi who went with the Expedition wrote me this information, adding that they suspected that the Port had been stopped up as they found some large banks or ridges of sand. As soon as I read this, I attributed it to the Divine interposition, that the Expedition not finding the Port of Monterey in the place indicated on the old charts, should proceed onward till arriving at the Port of our Father San Francisco, for the reason which I am now going to state.

"When the Venerable Father Fr. Junipero treated with the Most Excellent Señor Visitor General (Galvez) respecting the three first Missions which the latter had given him in charge to found in this New California, seeing the names and Patrons assigned to them, he said, 'and is there to be no Mission, sir, for our Father San Francisco?' to which it was replied, 'If San Francisco at that time more thoroughly explored than it had been previously; but for a long time previous to this, it had been known to the Spanish Government as one the most magnificent seaports in the world, and was doubtless looked upon as probably destined to become the grand emporium of that new commerce, which the sublime genius of Alveroni aimed to establish with the Asiatic nations, in which project he was defeated by the conspiracy of France and England at the court of his master.

§ 82. Seaports might be settled, towns might be built up in them, so far as might be convenient for the accommodation of the interior and exterior commerce, for which purpose it was only required that the sovereign proprietor of the land, or some one by him authorized, should grant building lots to those wishing to settle and establish themselves there. But the three laws which have already occupied too much of our attention, speak of the *termino y territorio* to be granted to the original founders, subject to distribution in the manner specified. *This could not be granted in seaports. They are excepted from the operation of those laws. They are reserved to the Sovereign.* I may suggest here the doubt whether under the laws of Mexico, any lands whatever can be given to towns or individuals, within ten leagues of the seacoast, without the previous approval of the supreme government of the Mexican Republic. I say to towns or individuals, for *so far as California is concerned, no power but Congress itself could give lands to towns or other corporations*, on which point I propose to speak more particularly in another place.

The Governor of California in his message to the Departmental *Junta* of 16th of Feb. 1840 (Doc. "D." filed in this case) expressly says that all the grants of land within ten leagues of the seacoast are illegal—*illegal*, that is the expression, and that no application had been made to the supreme government to *legalize* them. So says Capt. Halleck in his report which will be found 1 Rockwell p. 436. In Sinaloa, there was an act of the Legislature passed while it was a Sovereign State, authorizing the designation of *ejidos* to towns, which law remained in force after the establishment of the Central Government in 1836 (see ante § 5). The Governor of that Department, by a decree of July 8th, 1842 (2 Observador Judicial 265), established a regulation for the execution of that law, and in Art. 14 thereof it is declared,

"In the ten litoral leagues which the General Government reserved to itself by articles 4 and 5 of the law of Aug. 18, 1824, lands cannot be given in property to any *Pueblo*, corporation, nor private person."

§ 83. I shall not occupy the time of the Board with a detailed examination of Tit. 11, of the regulation for Presidios of Sept. 10, 1772 (Recopilacion of Arrillaga for 1834, p. 159), the document published by Rockwell (p. 451), purporting to be instructions from the Commandante-General of the interior provinces, of March 22, 1791; instructions from the viceroy, of Aug. 17, 1773 (Rockwell 444), nor the laws of Sept. 13, 1813, Aug. 17, and Nov. 26, 1833, and April 16, 1834, respecting the secularization of missions; nor the document on file, dated Chihuahua, Nov. 14, 1789, purporting to be "Instruction approved by His Majesty,

wishes to have a Mission, let him show you his Port, and it shall be founded for him.' The Expedition ascended. It arrived at the Port of Monterey: it tarried and planted a cross there without any one recognizing it among all that went, knowing only what they had read of it in history; they proceed forty leagues further up; they fall in with the Port of San Francisco, and all recognize it immediately, by the application of all the descriptions which they had of it. In view of this what could we say, but that our Sainted Father wished to have a Mission at his Port?

"Thus judged the Most Excellent Visitor General, for as soon as he received the information, (His Excellency being still in Mexico,) he obtained orders from the Vice-roy that the Mission should be founded at said Port," (Chap. 18.) This was done in the year 1776, of which the author gives an account in Chap 45:

"Having concluded the survey, the launch returned to the Port, and both Commandants communicated with each other the information obtained, and what they had seen and observed in order to report to his Excellency (the Vice-roy,) and considering that it was now time for the Paquet boat to return to San Blas, seeing that the order of the Commandant Rivera for the establishment of the Mission of our Father San Francisco came not, they resolved to proceed to take possession and make a beginning for it, as was actually done on the 9th day of October.

"After having blessed the site (*sitio*) and reared the holy cross, and made a procession with the image of our Father San Francisco, which was afterwards placed upon an altar, I sang the first mass, and preached of our Sainted Father as Patron of the Mission; at which foundation the people (*gente*) of the Presidio, the Barque, and the Mission assisted, firing their salutes during the progress of all the ceremonies." (See also Forbes' California, p. 93, 127–8.)

which was formed for the establishment of the new *villa* of Pitic in the province of Sonora, ordered (it is said in the title, but not shown any where in the document) to be adapted to the other new *poblaciones* projected and which may be established in the district of this *Comandancia*," nor the document dated 21st June, 1786 purporting to be opinion of the *asesor* of the *Comandancia* of the Interior Provinces (among which California was never included, but to the superior government of which it was subject from 1776 to 1788 only; see "Republica Mexicana in 1846," by Rodriguez, p. 7 and 8; 4 *Legislacion Ultramarina* 283–4, Junipero p. 229) on various subjects respecting the granting of lands to individuals, and the designation of the *termino* or limits of four leagues to new settlements so that within it the citizens may enjoy in common the pasturage, wood, waters and other natural productions as provided in L. 5, and those following it, Tit. 17, Lib. 4, R. I. (See ante § 38) to which he refers, as well as to the 8 and 9 arts., Tit. 14, of the regulation of 24th Oct. 1781."

No general regulation for Presidios settlements &c., for the interior provinces had any application to California after its own peculiar regulation of 24th Oct., 1781 was approved by the King. But this matters nothing; any argument, claim or right, that could be founded on these and similar Documents is fully answered in my remarks upon the laws to which they refer. The Pitic Document, the opinion of the *Asesor*, the order 1791 do not purport to be laws, nor could they possibly have the force of such if they did, but executive orders the operation of which so far as they had not actually been executed, ceased with the authority which had issued them. But if they had not ceased, if they had not only been applicable, but continued in force to this day, thay afford no assistance to the claimant because so far as San Francisco is concerned, they were never acted on. There was no town founded here. There was no measurment and designation by permanent monuments of the *termino* [limits] of four leagues therein spoken of—no asignment, measurement and designation in the same manner of the eight *suertes* of land which were to be granted to the town for its *propios*. But supposing that they had all been specially applicable to California and had continued to preserve all the force they ever had till this day, and could *now* be executed as fully and effectually as ever. This does not help the claimant, for so far as they relate to the *termino* of four leagues, they are wholly based upon and refer to the laws of the Indies [L. 6, 7, and 10, T. 7, Lib. 4,] which I have before discussed, and from the operation of which laws, as we have before seen, sea ports are expressly excluded by one of the articles immediately following in the very same statute. But allowing all I have here said to be of no weight, and that each and all the said orders, opinions, &c., had referred to this identical locality and been carried into full effect it would not help the present claimant except so far as respects the *suertes* of lands which were to be assigned to the town for *propios*, [See Pitic Doc. art. 14 and 15, Reg. of 1781, Tit. 14, art. 4 and 5, and the laws of the Indies cited ante § 38.]

The instruction for Pitic expressly directs that all the lands and lots within the *termino* of four leagues, distributed to settlers shall be given them by the Royal Commissioner in the King's name, (see the Doc., especially article 18,) in size and number according to his discretion, and gives to the Ayuntamiento and municipal functionaries no control whatever over any lands but the *propios*, and does not propose to give the town or its citizens any interest whatever in any other *lands* embraced within the said *termino*, or limits, of four leagues, nor does it propose to give the citizens any interest in the natural productions, but what is given by the general laws of the kingdom to which express reference is made as the *only* authority for the action proposed to be taken. This, with what is said by Elizondo, and by Viscaino Perez respecting the *termino* which may be assigned to towns (ante § 40, 52,) and the preceding part of my remarks and references, will be sufficient to dispose of this, and other similar documents. These observations will be found entirely applicable to the "opinion of the asesor," before referred to. It is an opinion founded upon various laws and royal regulations, which it particularly refers to, and which, when the paper is carefully read, will be found to have been already fully explained in my argument. As to what functionaries had authority to distribute royal lands and lots to private persons at different periods—whether the Commandants of the *Presidios* had it, and if so, how they received the authority, and within what territorial limits they were restricted in its exercise, and for what reasons, and whether because they *might* have granted lands and lots, any individual could sustain a claim for lands or lots which in fact were *not* granted to him, are questions not necessary to consider here.

§ 84. Have towns then no property by virtue of their establishment, in Mexico and other Spanish countries—none but what they acquire by the same modes as natural persons? I answer, none whatever. It was contemplated by the colonization laws of *Spain*, and let it be admitted that it is contemplated by the colonization laws of Mexico, that lands for certain purposes shall be given to towns, and it is clearly likewise contemplated by the said laws that lands shall be given to individuals. But in many, perhaps the majority of cases, both the one and the other are found destitute, because they did not get the grant from government, or because they had not means to buy them, or, perhaps because they did not want them. How then do towns grow up in Spanish countries? I answer in the same manner as in the United States, by the union and the concentration of the population at some particular point, the establishment and natural increase of trade, commerce, manufactures. The citizens who want dwelling-houses, stores, or shops, build them or buy them from the lawful owner. Those who want lots to build on, purchase or receive them by gift from the proprietor, whether he be the sovereign or some private person, and the property is not changed in any manner by the formation of the town, or its erection into a corporation. *There is no Spanish or Mexican law or authority that ever has been, or ever can be adduced in refutation of this proposition.*

§ 85. By law 4, T. 12, Lib. 4, R. I. of 1568, (five years after the promulgation of the *Ordinanzas de Poblaciones* be it noted) to supply a defect it would seem in the ordinance of 1563, which relates exclusively to the establishment of towns by contract, it is provided that—

"If in the parts of the Indies already discovered, there be some sites (*sitios*) and districts (*comarcas*) so good that it may be expedient to found towns (*poblaciones*) and any persons should apply to establish themselves, and take up their residence therein, in order that they may do it the more willingly, and with greater advantage let the *viceroys* and *Presidents* give *them in our name*, lands *solares* and *waters*, according to the situation of the land, provided it be not in prejudice of third persons, and be during our pleasure."

Compare this now with L. 5, 6, 7 and 8, of the same title, and L. 11 and 14, T. 7, and article 4 and 5 of title 14 of the regulation of 24th Oct. 1781 (Arrellaga Recop. 1828, p. 162) and no doubt whatever can remain that the king was deemed the absolute owner of all lands, and lots in towns which had not been expressly granted.

The said law, 5 Tit. 12 of 1532 provides that when distribution is to be made of lands, waters, watering places, and pasturage among those who go to settle (*poblar*) the *vice-roys* or *Governors* who have authority from us, shall make the distribution (*repartimiento*) with the *parecer* (opinion or advice) of the *Cabildos* (council or Ayuntamiento) of the cities or *villas*, (i. e. within whose termino the lands are) taking care that the *Regidores* be preferred, if they have not equivalent lands and *solares;* L. 6 (1534) that at the distribution (*repartimiento*) of the *vecindades* [lands given to residents] *Caballerias* and *peonias* of lands which may be given to the *vecinos*, the Procurador of the city or *villa* in which this is to be done be present; L. 7 [1588] that the distribution [repartimiento] of lands as well in new towns [poblaciones] as in places and *terminos* which may be already *poblados* [where towns may be already established] be made with impartiality and without respect to persons.

L. 8, [1563] provides "That if there be presented a petition soliciting *solares* or *lands in a city or villa*, where our *audiencia* resides, the same shall be first presented in the *cabildo*, and being there conferred upon, two *regidores* shall be deputed who shall make known to the viceroy or president, the opinion of the *cabildo* [*lo que al cabildo pareciere*] and being considered by the *vice-roy* or *president*, and deputies, let the *despacho be given signed by all*, in the presence of the *Escribano* of the *Cabildo*, *in order that he may record it in the book of the Cabildo*; and if the petition shall be for the distribution [*repatiniento*] of waters and lands for machinery or mills [*ingenios*,] let it be presented before the Viceroy or President, and let him remit it to the *Cabildo*, who likewise having conferred upon it, shall send by a *regidor* to declare their opinion [*parecer*] in order that being considered (*visto*) *by the Viceroy or President he may decree* (*provea*) *as may be proper* (*lo que convenga.*)

§ 86. It ought to be constantly borne in mind that in all Spanish countries, the local authority is the *Municipal* whose *informe* should be taken on all affairs of the Government relating to its demarkation, and especially in the distribution of lands to citizens, which is to be done with impartiality, and with a knowledge of the particular claims, and merits of each one as well as of the actual condition of the lands solicited, all which information the local authority alone can communicate.

But in all cases the grants are to be *made* by the Viceroys, Presidents or Governors who may have royal authority therefor, after taking the opinion or *informe* of the respective municipal authorities in the same manner, as by the regulation of 21 Nov., 1828, [Art. 3,] the Governor may, and in many cases ought indispensibly to take the *informe* or *parecer* of the respective municipal authority.

§ 87. The said royal regulation of 24 Oct., 1781, made especially for California [articles 4 and 5,] provides that [Art. 4] "the *solares* which may be granted to new *pobladores* must be assigned by the Government in the sites [*sitios*] and with the extension corresponding to that of the land where the new *Pueblos* may be established, in such mode that there may remain formed streets and a *Plaza*, conformably with what is provided by the laws of the Kingdom [this was only a regulation and instruction] and regulated thereby [*con su arreglo*] there shall be assigned *ejido* sufficient for the *Pueblo* and *dehesa* with the tillable lands suitable for *propios*."

Art. 5. "Each *suerte* of land as well irrigable as de *temporal*, must be two hundred varas long and two hundred wide, this being the extent which is usually occupied by one *fanega* of Indian corn in sowing. The distribution which of the said *suertes*, as well as of the *solares*, *must be made in the name of the King our Lord*, shall be executed by the government, with equality and in proportion to the extent of land which has the advantage of irrigation, in such manner that having previously made the proper demarkation, and reserving *valdias*, the fourth part of the number which results, compared with the number of the *Pobladores* if there should be so many [that is, as take three-fourths] two *suertes* of irrigable, and two of dry land, will be assigned to each, and of the king's *suertes* [*realengas*] will be set apart, such as may appear suitable for *propios* of the *Pueblo*, and of the rest [of the *suertes*] [*las restantes*] *grants shall be made by the Governor in the name of his Majesty*, to those who newly [*de nuevo*] come to settle, *as likewise of the respective solares*, and especially to soldiers who having completed the time of their enlistment, or their advanced age, may retire from the service, as well as to the families of those who may have deceased."

§ 88. Here is a commentary upon the laws of the Indies and the Sovereign's proprietary right to the lands in towns, so clear and explicit in itself that I am saved the necessity of any explanation. But I have two others not less clear and explicit, the one by *D. Pedro Fages*, Governor of the Californias, and the Commissioner José Moraga, Lieutenant *Comandante* of the Presidio of San Francisco, and the other of less recent date by the King and royal council of the Indies; which as they prove themselves, so far as concerns my present purpose, I have adopted as part of my argument.

The following statement from one who was an eye-witness to what he relates, will serve as an appropriate introduction to the first:

" In order to give sustenance and stability to this spiritual conquest, the most Excellent Señor Viceroy, gave in charge to the new Governor *D. Felipe Neve*, that he should procure to settle [*poblar*] the country with some *Pueblos* of Spanish people, who should occupy themselves in the cultivation of the lands, and the rearing of cattle and beasts, [horses and mules,] which might serve for the maintenance of these acquisitions. And the said Señor keeping in mind this superior order, having observed when he came in sight of the royal Presidio of this Port, [of San Francisco] the extensive plains in which the Mission of Santa Clara is situated, the great extent of land which might be irrigated with the abundant waters of the river named our Lady of *Guadalupe*, he assembled the *pobladores* who had come with the expedition from Sonora and adding to them others, he assigned to them a site [*sitio*] and distributed lands for the formation of a *Pueblo* entitled of *San Joseph de Guadalupe*, designating for the location [*abicacion*] thereof the place above the Mission of Santa Clara, on the other side of the river named *Guadalupe* towards its rise, three quarters of a league distant from the houses of the Mission. "In the said site [*sitio*] the colonists [*colonos*] formed their *Pueblo* giving a beginning thereto in the first days of November 1777, to the which, other *vecinos* have been added, and all governed by an *Alcalde* of the same *vecinos*, subordinate to the Governor of the Province, with a guard of three soldiers, and one Corporal, all resorting to the Mission to hear Mass. They maintain themselves with the crops which they gather of wheat, beans and Indian-corn, and with the surplus which they sell to the troops they clothe themselves, for the same purpose rearing large and small cattle and mares, in order to supply the troops with horses."' [*Palou*' Life and Apostolic labors of Father Junipero, p. 225.]

§ 89. Here you have a *Pueblo* fairly established by the Governor, in person, acting under orders of the Viceroy, who had to the same effect received his instructions from the king [vid same author, p. 63.] All that remained now to be done so far as regarded the *establishment* of the *Pueblo*, was to make immediate report to the king according to L. 4, T. 1, Lib. 4, R. I. Yet this *Pueblo* thus fairly established with its Municipal Government installed, had no lands, nor anything it could call its own, but the immortal honor of being the Pioneer town in the most magnificent country in the Universe. Five years afterwards the initiatory steps were taken in conformity with L. 1, T. 13, and L. 1, 13 and 14, T. 7, Lib. 4, R. I., and the royal instruction of 1781 in the designation of lands for *propios* and *Ejido*, as well as for giving to the settlers formal titles for their respective allotments. It was done in this form:

"Don Pedro Fages, Lieutenant Colonel of the royal army, and Governor of Old and New California, &c.

"Inasmuch as in Title 14 of the royal regulation which governs in this Peninsula, is provided the mode of distributing *solares* and *suertes* of land with all else relating to cultivation, and rearing of cattle, and the establishment and advancement (*fomento*) of *Pueblos* of civilized people, (*Gente de razon*,) which may be located in the territories adjacent to the *Presidios* of these new establishments, and it being convenient to practice the formalities requisite in giving possession to the citizens of San José de Guadalupe, in order that they may subsist in peace and quietude:—

"Therefore I commission D. José Moraga, Lieutenant *Comandante* of the Presidio of San Francisco to proceed to the said Pueblo, and conformably with the instructions contained in the aforesaid royal regulation, give possession in the name of his Majesty, (whom God preserve) to each one of the settlers of the *suertes* and *solares*, which are destined for them, proceeding by formal acts (*autos*) and in continuation of this mandate, forming for each one of the parties interested, a *despacho* with insertion of a copy of this *Expediente*, and of the proceedings relating to each, he will remit the same for confirmation, in order that this government in view thereof, determine as may seem convenient; enjoining that it must appear (in said *Expediente*) that the citizens are made aware of what is *realengo*, and what is of the common (*comun*) as are the *Ejidos*, watering places, fuel, &c.; that it must be expressed in each dispatch and proceeding giving possession, that it is received and admitted subject to the conditions and penalties, which the said instruction imposes, as well as the privileges, favors and exceptions with which the sovereign makes the grant, and all must sign or some other by their request with the commissioner himself and witnesses; and lastly that in the principal book of records an entry shall be made of their possessions as well as of the branding irons, [for marking their cattle] which are to be given to them of all which a certified transcript [*testimonio*] is to be obtained and archived in the said Presidio of San Francisco.

MONTEREY, Oct. 24th, 1782.

PEDRO FAGES.

"In the *Pueblo* of San José Guadalupe, on the thirteenth day of the month of May, of the year one thousand seven hundred and eighty-three, I, D. José Moraga, Lieutenant Comandante of the royal Presidio of San Francisco, in pursuance of the mandate which precedes, must proceed to its punctual fulfillment, and as the said instruction in articles 4 and 5 declares," &c. [here is inserted verbatim the 4th and 5th articles, Tit. 14 of the regulation of 24th Oct., 1781]; "being fully aware of all which, it is my duty to command and I do hereby command, that when the proceedings shall be concluded with the execution of whatever may be justly required, the originals be remitted to the Governor for his approbation, or the purposes which to him may seem meet, and that a copy remain in the archives under my charge. Thus I have ordained, decreed and signed, which I authenticate.

JOSE MORAGA.

"In the same *Pueblo*, day, month and year above expressed, I, the said Lieutenant Commissioner for the possession and *repartimiento* of *solares* and *suertes* of land to the settlers of the *Pueblo* of San José de Guadalupe, in view of the act which precedes, it being indispensible in order to execute it, to appoint assisting witnesses during the progress of the proceedings, do name for that purpose the soldiers Felipe Tapia, and Juan José Peralta, whom I made aware of the contents of this appointment, in order that in view of the circumstances corresponding, they might obligate themselves to give their assistance in the respective acts. Thus I have decreed, ordered and signed, which I authenticate.

JOSE MORAGA.

In the said *Pueblo*, day, month and year aforesaid, I, the said Lieutenant Commissioner, by virtue of the preceding appointment having in my presence Felipe Tapia and Juan José Peralta, soldiers of the company of the royal Presidio of San Francisco, made known to them the preceding decree, the which having heard, they said that they accepted the said appointment, and promised their assistance in these proceedings, with the punctuality which I exact of them, and to which they are obliged, and they signed with me which I authenticate.

JOSE MORAGA,
FELIPE TAPIA,
JUAN JOSE PERALTA.

In the said *Pueblo* on the 14th day of May, in the year one thousand seven hundred and eighty-three, I, the said Lieutenant Commissioner, in continuation of these proceedings in duty ought to, and do command to appear before me, and the witnesses of my assistance, the nine *Pobladores* [settlers] of the said *Pueblo*, and having all present, in the name of his Majesty, [whom God preserve], I gave possession of the respective *solar* thirty varas square for a dwelling house, to the *Alcalde* and settler Ignacio Archuleta, who was made acquainted therewith, and he said that he was aware of the privileges, favors and exceptions with which the sovereign made him this concession under the penalties imposed on the disobedient; and being interrogated if he admitted the possession given, replied that he did, and offered to fulfil the obligations contracted in his establishment [here follows the discription of the lot]; not knowing how to sign, Tiburcio Basquez did it at his request; I did the same with the assisting witnesses.

JOSE MORAGA,
FELIPE TAPIA,
JUAN JOSE PERALTA,
TIBURCIO BASQUEZ.

And immediately in the said *Pueblo*, day, month and year, I proceeded with those in my assistance, and the settlers to the arrable lands, and the measurement having been first made, two hundred varas in length and two hundred in breadth, of each *suerte*, I gave possession to the said Alcalde Ignacio Archuleta of the four *suertes* of land to which he is entitled, all irrigable, there not being sufficient of the description provided for in the said instructions for *Pueblos* of civilized people, [*gente de razon*], [here is the description which is omitted]; the possession being given with the same formalities and requisites expressed in the foregoing proceeding relating to the *solar* of the said Ignacio Archuleta, who not knowing how to sign, Jose Tiburcio Basquez did it at his request, and I did the same with those of my assistance.

JOSE MORAGA,
JOSE TIBURCIO BASQUEZ,
FELIPE TAPIA,
JUAN JOSE PERALTA.

(The next act is that of delivering the branding irons for marking cattle. The formalities practiced in giving possession to the other settlers, are precisely the same, after which follows the designation of *Ejido,* and seting apart *suertes* of land for *propios* of the *Pueblo.*)

In the Pueblo of San José de Guadalupe on the 19th day of May, of the year one thousand seven hundred and eighty-three, I, D. José Moraga, Lieutenant *Comandante* and Commissioner for the execution of these proceedings, in duty ought to, and do order, the acts of giving possession of the *solares* and *suertes* of land to which each settler of the said *Pueblo* is entitled, being concluded, that I do proceed with them to the lands of the part to the —— of this *Pueblo,* and its river, and the measurement having been made from the —— and river below, unto the boundary which divides the lands of the said *Pueblo* from those of the Mission of Santa Clara, from such measurement there result 1958 varas to the said boundary. Of this quantity the half is designated for *propios* of the *Pueblo*, and the remainder *is to be considered royal land* [*realengo*], *with all the rest of the land which is not comprehended in the portions of which possession has been given to the settlers,* and for *Ejidos* of the said Pueblo, there is designated all the —— fifteen hundred varas in length and seven hundred in breadth, with all of which I made them fully acquainted, and they unanimously said that they understood as well what belonged to their respective possessions, as what was *propios* of the *Pueblo,* and what royal land, (*realengo*) with all else which has been made known to them, and not knowing how to sign, Jose Tiburcio Basquez did it at the request of all; I did the same with the present witnesses, which I authenticate.

JOSE MORAGA,
JOSE TIBURCIO BASQUEZ,
FELIPE TAPIA,
JUAN JOSE PERALTA.

MONTEREY, Dec. 31st, 1783.

I approve all that has been done in these proceedings, and the originals will be delivered to the settler —— in order that they may serve him as a title and the ends convenient.

PEDRO FAGES.

Thus with the exception of the *propios* which would be the private property of the municipality, provided the king confirmed it (see L. 1, T. 13, Lib. 4, R. I.) all the lands in the *Pueblo* of San José of which possession had not been given to individuals, remained the property of the sovereign, a conclusion which it seems common sense would dictate.

§ 90. I have another commentary of somewhat modern date on the laws of Spain and the Indies which I have cited to show that the landed property of the sovereign is not changed or in any manner qualified or restricted by any territorial demarkations whatever. The city of Havana in the Island of Cuba, was founded in the year 1515. In its municipal ordinances formed by the kings command, and approved May 27th, 1640, authority was given to the Ayuntamiento [see articles 63 to 72] to grant building lots as well as lands outside of the population for keeping cattle &c. [Legislacion Ultramarina V. 3, p. 410.] They exercised this authority for above a century, but their grants or concessions did not convey the property, according to the opinion of the *Fiscal* of the Royal *Hacienda* expressed in an *informe* dated Oct. 6th, 1797,[ib. V. 6, p. 49 § 9] because, he says "in those which I have seen I do not find that the grants were made in the Royal name of his Majesty, and as the whole soil of the Island pertains to the royal patrimony, the said *Cabildos* (*Ayuntamientos*) could not grant in any other mode, nor even in this without special authority from the Sovereign."

By a royal *cedula* of Nov. 23, 1729, they were prohibited from exercising this authority any longer, which as it lays down the law very clearly, I shall read in English in continuation of my argument:

"THE KING.—Council, judiciary, aud government of San Cristobal of Havana. By a dispatch of this day I have thought proper to confirm and approve the sale which Jose Rodsiguez made on the 27th March, 1721, before Miguel Hernandez Altuno, Notary Public of that city, to D. Antonio de la Luz, resident of the same, of some houses and lots [*solares*] which belonged to him in the place [*sitio*] called *Molinillo*, granted by you in the year 1699, to D. Pedro Garabuni and D. Jose Manuel Aleman, and tranferred by the said Jose Rodriguez; and considering that you have no authority to concede *mercedes*, lands, and *solares* and effectuate the sales and transfer thereof, as you did in case of those of the said Jose Rodriguez, and that it belongs and appertains to me exclusively to dispense such favors (*gracias*) and concessions and in my royal name to the sub-delegates who are appointed in that city to the commission for the composition of lands which (*appointment*) I have given to D. Diego de Zuñiga, minister of my council by a dispatch of the 5th Dec., 1720, it has appeared meet to ordain and command as I do, that henceforth you do abstain from granting *merced*, lands, and *solares* of that jurisdiction, which authority can alone be exercised by the said sub-delegates of the aforesaid commission for composition of lands, and recovery of forfeitures in virtue of the authority which they may have received from the exclusive judge in this matter. Thus is my will "Dated in Saville, 23d Nov., 1729." (Biblioteca de Legislacion Ultramarina V. 6, p. 43.)

§ 91. The *Ayuntamiento* did not pretend to have any right to four leagues, or any other quantity whatever of vacant lands within their jurisdiction, but represented to the king that it would be *convenient* that the authority for making grants and distribution of lands and *solares* should be continued to them which gave occasion for another royal *cedula* dated the 16th Feb., 1739. This after reciting that the subject had been maturely considered in the council of the Indies, commands that the municipal government observe strictly what had before been enjoined, and thenceforth abstain from exercising the authority that had been delegated to it in the municipal ordinances (articles above cited) with respect to making grants and distribution *of lands and lots within its jurisdiction*, reiterating what is said in the former *cedula*, that the authority to do this resides exclusively in the sub-delegates of the royal *Hacienda* (ib. p. 44.)

In 1823 a rapid increase of the population having taken place and consequent advancement in the value of lands outside the walls, it became an object not only to put the vacant and unclaimed lots in market, but to investigate the right of those who had usurped the possession of some of them without just titles. They were accordingly disposed of (those that were vacant) on account of the royal treasury, the municipal government having no intervention in the business, and interposing no claim to the lands, and those who were occupying without sufficient titles resorted, not to the municipal government, but to the superintendent sub-delegate of the royal Treasury, to procure a confirmation by way of composition (ib. V. 3, p. 313—14.)

§ 92. That towns, by virtue of their establishment and demarkation of *terminos*, (limitary territory,) become the owners of the lands embraced within such limits, or that they thus become the owners of four leagues square, four square leagues, or any other specific quantity of land or other property, is an idea that does not seem to have had its origin in Spanish countries. Any traces of such a doctrine will be sought in vain among the statutes, customs or opinions of commentators in those countries. The *lex scripta* saith it is not in me, and the *lex non scripta* saith I know it not, go, seek for it in the *lex ignota*.

It did not occur to any body, it seems, when the *Pueblo* of Manzanillo was incorporated, nor to the Governor of Sinoloa when he promulgated the order for assigning *Egidos* to the towns in that department (2 Observador Judicial 265), nor to the King and council of the Indies, or the illustrious *Ayuntamiento* of the city of Havana, when that corporation was absolutely inhibited from granting *any* lots or lands whatsoever within its jurisdiction and the building lots and other lands were assumed without dispute to be the property of the King, nor was any such right recognized or alluded to, when by a special royal decree the *Ayuntamiento* of the city of Mexico was authorized for the first time to grant building lots (ante § 26,) although that *noblisima* (most noble) and loyal city had then been established and incorporated under the Spanish rule for a period of more than one hundred and seventy-five years. No such right is recognized, nor referred to in the royal regulation of 24th Oct. 1781, Tit. 14, respecting the establishment of towns in California (see ante § 86,) nor in the proceedings giving possession to the *Pobladores* of *San Jose*, and marking out the lands of that town (ante § 89) nor in the decree of the Spanish *Cortes* of 4th Jan. 1813, in which all the lands within the limits of towns, except those of the *propios* are regarded as the property of the nation (ante § 55 to 59;) no such right is recognized in l. 9, T. 21, lib. 7, N. R., and l. 20, T. 12, Lib. 4, R. I., prohibiting the towns to grant *any* lands within their limits; nor in l. 22, T. 12, Lib. 4, R. I., granting *special authority* to the *villa* of *Tolu*, to make distribution to settlers of certain lands within the *Termino* or demarkation; nor in L. 14, T. 7, Lib. 4, R, I., authorizing the viceroys to set apart lands in one town for the *propios* of other towns which may be destitute; nor in the law of the Mexican Congress of April 18, 1828, granting the lands known as *Desierto Viejo* to the *Pueblos*, to which it was contiguous, of the district of *San Angel* for distribution, in the mode specified in that act; nor in L. 1, 4, 5, 6, 7 and 8, T. 12, Lib. 4, R. I. (ante § 85), conferring upon the viceroys and presidents of the audiencias, the exclusive authority to grant and distribute lands and lots *within*, as well as without the limits of towns; nor in the royal instruction of Oct. 15, 1754; nor in the 81st Art. of the *Ordinanza de Intendentes*, of Dec. 4, 1786; nor in any of the laws and regulations of the Mexican Republic on the subject of colonization.

§ 93. On the contrary, the doctrine referred to is repudiated by all the laws, and all the commentators, and the practice of the government in all ages, as well as by common reason itself. The errors which we have committed on this subject have arisen in part, from our not understanding well the agrarian laws of Spain, and not comprehending the peculiarities of the political system of that country, of which the *ayuntamientos, consejos, cabildos, curias*, or *regimientos* of the towns and cities, have always constituted an essential part, having an intervention in every matter of government affecting persons or things within their *terminos* or jurisdiction. But we have also been misled by translators, who, without any knowledge, such as could only be acquired by a thorough acquaintance with the codes and the law writers, of the meaning and application of legal terms, have by a dash of the pen made at random, laid down the law for us in the most abstruse subjects.

§ 94. In order that a town may grow up, it is not necessary, nor has it ever been the practice in Spain or Mexico, nor in any other country that I know anything about, for the government to grant the land on which it is founded to anybody but the settlers individually—to each one the portion which he is permitted to occupy. Why should the government grant the lots intended for private use to the corporation, even after the town comes to be erected into a corporation? These lands are not destined to the use of the corporation, but to private use exclusively, and if the government should grant them to the corporation it could be only with the object that the corporation should regrant them to individuals. Would it not be as well for the government in the first instance to grant the lots directly, through its local agents, to those for whose use they are destined? Such seems to have been the policy of Spain, which has not been changed by any legislation of the Mexican Republic. "Let the *solares* be distributed by lot to first settlers, continuing from those which correspond to the *plaza mayor*, and let the rest remain for *us* to make grant thereof to those who shall afterwards come to settle, or whatsoever our pleasure may be," (L. 11, T. 7, Lib. 4, R. I.). And in the regulation for California, for Oct. 24, 1781, after enjoining upon the governor to distribute in the king's name, one building lot (*solar*) and four *suertes* of land for cultivation to each original settler, it is provided, "and of the rest, grants shall be made by the *Governor in the name of his Majesty*, to those who newly come to settle, as likewise of the respective *solares*" (ante § 87. The same policy was observed in the colonization laws of Mexico, which necessarily comprehend the formation of towns. These laws make no provision for granting *any* lands to towns, much less do they contemplate the idle ceremony of granting to towns, lands which are intended for the use of individual settlers, in order that the towns may reconvey them for that purpose. Municipal corporations, which, as we have already seen, were under the perpetual tutilage of government, and without its especial license could not alienate anything whatever that belonged to them (ante § 21, 24), were not invested with the property in those lands which were intended to be alienated as fast as they could be settled.

§ 95. The regulation of Nov. 21, 1828, contains the authority for the distribution of lands in towns as well as elsewhere in the territories of the Mexican Republic. It is delegated by the supreme government to the *Gefes Politicos*, and Territorial Deputations, and these have in their turn delegated the power, with such restrictions as they have thought proper to impose to other inferior authorities. It is provided in this regulation, that the land to be granted for a building lot (*solar*) shall be of one hundred varas (Art. 15), that the union of many families into a town (*poblacion*) shall conform (*seguirá*) in its formation, government, and interior police, to the rules established by the laws remaining in force (*vigentes*) for the other towns (*poblaciones*) of the Republic, taking especial care in the new ones that they be built up (*se construyan*) with all possible regularity (Art. 13). That no *contract*, however (*capitluacion*), for founding a new town (*poblacion*) shall be admitted, unless the contractor (*capitulante*) obligate himself to present as *pobladores* (original settlers), at least twelve families (Art. 10). In this regulation, and the 16th section of the colonization law of August 18, 1824, we must look for the authority to grant and distribute lands and lots. The power resides by law in the supreme government of the Republic, and by the regulation referred to, has been delegated to the territorial governments, which have again sub-delegated the same power, under restrictions, to other subordinate authorities.*

§ 96. Subsequent to the regulation of 1828, and after the establishment of the Constitution of 1836, the power to regulate the distribution of lands in town was conferred upon the prefects (Law of March 20, 1837, Art. 77), a provision which was adopted by Congress, from the Constitution of the State of Mexico (Art 155). Governor Alvarado is right when he says, as he does in his deposition, that the power exercised by the municipal authorities in all the towns in California in granting lands or lots, was derived, so far as they really possessed it, either from the government of the department, or from the prefect. *No other authority ever has been, or ever can be shown.* In 1835, the governor, with the concurrence of the Territorial Deputation, delegated to the ayuntamiento of the *Cuasi Pueblo* of *San Francisco de Asis*, the power to grant lots not exceeding 100 varas square "in the locality (*paraje*), named *Yerba Buena*," with the restriction that such grants should not be made within two hundred varas of the beach, a restriction which does not seem to have been removed while the Mexican Government continued (see Doc. No. 6, annexed to the deposition of M. G. Vallejo). Authority was also given from time to time, to make grants in other localities, the governor himself continuing to grant within the same limits, whenever he thought proper, the parties interested resorting to him directly, whenever their application was for a larger quantity of land than that which the subordinate authorities were authorized to grant by the superior order which ruled for the time being.

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* The 16th section of the general Colonization act of the Mexican Congress of 18th Aug. 1824, provides that "the *Government* in conformity with the principles established in this law shall proceed to colonize the Territories of the Republic." It makes no mention of any subordinate functionaries, but provides that the Government, consisting of the President of the Republic, and the Constitutional Ministry shall execute the law. The President, however, by the regulation of 21st Nov. 1828, committed to the Governors and Territorial Deputations, a portion of the authority which the *law* confers on the *Government alone*. If this is a delegation of the power, then it would seem to have been judged, by the Mexican Government at least, that the power so far as regards granting lands and lots to "*contractors, families* and *private persons*," may be delegated. By the first article of the act of Congress of 20th March, 1837, it is provided that—

"The interior Government of the Departments shall be encharged to the Governors, Departmental *Juntas*, Prefects, Sub-Prefects, Ayuntamientos, Alcaldes, and Justices of the Peace." Where does this authority begin, and where must it end? It must begin with the Government, the Supreme Executive, and under the authority, rules and restrictions which may be given and prescribed, be contiually exercised by the constitutional agents and subordinates of the Government, no one having any power to act without direct authorization of his superior.

At one moment it is said by counsel for the claimant, that the Territorial Government could not confer on Ayuntamientos power to grant building lots, and in the next moment, that it *could* confer this power upon them, and a good deal more with it, namely: the property in the lands themselves; that is to say, that the Governor and Deputation have the power by *implication* (for it is not pretended that any express law gives it) to grant to a corporation a tract of land which would embrace a thousand, or a hundred thousand building lots, but would not have the power to authorize the same corporation, or its authorities, to grant *one* lot out of the same tract, to an actual settler! If the authority which Ayuntamientos, Justices of the Peace, &c., have sometimes exercised to grant building lots and lands within their demarkation, is not derived by delegation from the Government, they have acted *without* authority, for no law has been, or ever can be produced showing that they ever possessed any other. The power, whenever they have possessed it, has always been given, restricted, modified, and taken away at the pleasure of the Government.

As to any *property* which the Corporation may possess, no part of it can be alienated without express license of Government in each particular case given upon formal *information* of necessity and utility (vid. ante § 22, 23). A *general* license would be equivalent to a repeal of the law imposing this restriction, in the same manner as if a judge should assume to give to all minors or their guardians, within his jurisdiction, general license to alienate their landed property at pleasure.

§ 97. It is strange that we should have committed any mistake in respect to the source from which the authority is derived for granting town lots in those places which have grown up on lands belonging to the Mexican nation. In towns which may grow up on private lands, no one would doubt that the authority for granting lots would reside solely in the proprietor and his duly constituted agents. It is true that *poblaciones* (towns) are not permitted to be formed without license from the supreme power of the State (*Compendio del Derecho Publtco y Comun de España* v. 1, p. 330, *Ordenanzas de Tierras y Aguas p.* 80.) But the prohibition or the license to form *poblaciones* has nothing to do with the property in the lands which may be occupied for that purpose. That must be acquired from the lawful owner. A simple reference to the archives of the Departmental Government, and to the records of grants made prior to the American conquest, in the place called Yerba-buena, and in the secularized Mission of San Francisco which will be found set forth in detail in Doc. "E." would have set us right on this point. The local authorities or municipal, of the Msssion and so called *Pueblo* of San Francisco, by whom these grants were made in the two places referred to, never pretended to have any inherent power, or authority *ex officio* to make them, much less did they claim for the town any property in the lands granted, but acknowledged that the authority was derived from the departmental government, taking especial care to have this appear of record in the book of protocols for the security of the respective grantees.

§ 98. It appears by the certificate of Washington A. Bartlett, who then filled the office of Alcalde, by appointment from Capt. Montgomery, dated August, 1846, that he "applied to Don Jose de Jesus Noe, the Alcalde of said town under the late Government of California, to surrender all public archives and documents, when this book (the one on which the certificate is endorsed) was given up as containing the only record of the grants of lots in said town of *Yerba Buena*."

This book purports to contain the record of all the grants made in the Pueblo or Mission of San Francisco and the place called Yerba Buena at any time prior to the date of its delivery over to the American authorities. The dates of grants commence in 1839 and end with the 6th of June, 1846. It commences by recording the *authority* of the functionaries by whom the grants are made, and for this purpose has three titles or headings following each other successively. The first is as follows:

"Book in which are evidenced the possession of *solares* in the point (*punto*) of Yerba-buena in virtue of the orders (*lo dispuesto*) of the Departmental Government."

In the second: "Are evinced those granted in the establishment of *Dolores* in pursuance of the authority applied for (*lo pedido*) by the Prefecture of the district to the Government of the Department, of which I have cognizance, as evidenced by the official note which is found on page 2."

The third gives the "Formula showing the mode in which possessions of *solares* to form habitations, have been given to the citizens (*vecinos*) of the jurisdiction of San Francisco de Asis."

The official note referred to which was written by José F. Castro acting as Prefect *ad interim* states that he had received from the Secretary of Government an official communication under date of 16th of April, 1851, reciting that when the Prefect Don Jose Castro made a visit to the North, he bore with him instructions from the Government on various subjects, and among others it was ordered that *solares* might be granted to individuals in the establishment of Dolores, but they must not exceed fifty varas, which disposition of the Government was now renewed in consequence of the official communication of the Prefecture dated the 6th of the same month which his Excellency (the Governor) had seen.

§ 99. In this book are recorded fifty-five grants, in all, including those which had been made at the Mission and at Yerba Buena; of these, ten were made either directly by the Governor or in pursuance of his *especial* order, four or five were made in pursuance of a special decree of the Prefect made in each case. These grants made by the Governor and the Prefect, are as well of fifty vara lots, as of hundred vara lots, and some of them are also for lots situated more than two hundred varas from the beach. Two of the grants were made by the Governor on the 22nd April, 1846. The remaining grants appear to have been made in virtue of the authority given by the Departmental Government which is referred to on the first page. One of the grants made by the Governor, was in the form of a license to erect some sort of machinery, and the decree of concession contains these unequivocal words respecting the property in the land:—"It being understood that as soon as the said *solar* shall be disoccupied by the machine referred to; it shall remain to *the benefit of the nation* for the uses convenient."

It will be observed also that no mention is made in this book of any town or "*Pueblo*," although reference is frequently made to a *plan*. The place in which the grants this side of Mission Creek are made, is designated and identified as the *punto* [point] or [paraje] [locality] of *Yerba Buena.*

§ 100. There is therefore not only no evidence of a grant or appropriation in any form of any lands to any town or *Pueblo*, and no evidence that any lands were ever supposed to belong to any town, or were ever claimed by any town within fifty miles of this, but there is the clearest proof to the contrary. In the case of the United States *vs.* New Orleans, [10 Peters] there was evidence that the corporation had occupied the land in question, for upwards of a century, and by maps and other evidence, the court thought a dedication of the land to public use, was sufficiently established, and, in all the cases heretofore investigated in our courts, where towns have set up claims to lands, the right asserted, has been sustained by *some* evidence.

But this claim has none whatever, not even the weakest presumption to rest upon. No grant, not even the initiatory steps to obtain one, not so much as a *desire* appears to have ever existed to obtain one, or to have any lands; no dedication to public use: no possession or occupancy; no acts of ownership; no right asserted or once alluded to at any period of time, on the part of the *imaginary* corporation which the claimant pretends to represent. Surely the case is a very remarkable one.

§ 101. But in the absence of a single relevant *fact*, I am willing that the counsel for the claimant, should avail themselves of every *conceivable* or *imaginary* one, that might legally have existed. Keeping themselves within the bounds of what is legally possible, let them for once only, frame a grant, document, or title *nunc pro tunc.* I will not trouble them with any captious objections about the formalities preceding or attending its execution; only let it be reasonable and possible, for therein consists the true spirit of romance. Let it not conflict with the laws and the customs and the common sense of the times and the country in which the thing is got up. I will only beg to be informed by *what authority* and under *what law* the document is issued.

In the case of Cohas *vs.* Roisin and Leguis, [not yet reported] in the Supreme Court of California, the Chief Justice said: "I am satisfied that long before the grant on which this controversy arises was executed, the *Pueblo* of San Francisco was organized and a grant of Pueblo or municipal lands made to it by the Governor and confirmed by the Territorial *Legislature* of California." Is this fancy, or is it fact? That it is not matter of fact, is evident, for if it were, in a case so needy as this, his Honor would have received a *consular duces tecum* invitation to produce the document. It is fancy then, and it is in point, as I have allowed the counsel to *imagine* the best document they can in support of their claim.

§ 102. This *imaginary* Document then emanated from the Governor and Territorial Deputation [not Legislature, for no such body existed]; as such I shall proceed to test it by the laws. I presume it will not be pretended that the Territorial Deputation of California, while that body existed, had any Legislative authority. For by the constitution of 1824, [art. 50] it belongs *exclusively* to the General Congress "to give laws and decrees regulating the interior administration of the Territories." Much less will it be assumed that they had constitutionally any power to dispose of, or to make laws regulating the disposition of the National Domain. By the Constitution of 1812, [art. 324] and the law of 23d June 1813, [chap. 3,] which law remained in force mainly until the organic law of 20th March, 1837 was enacted, the Political Government of each Province was declared to be vested in a Superior Political Chief, whose powers and attributions are specially designated, together with those of the Provincial Deputation, [chap. 2,] which seems to have been not a *coördinate* but a *subordinate* branch of the Provincial Government. After the adoption of the Constitution of 1824, and the organization of the Territories of the Mexican Republic, their interior government and administration continued to be regulated by this law of the Spanish *Cortes*, so far as it did not conflict with the new constitution or laws of the Republic. The *Gefe Politicos*, continued to be appointed under the same name, and Territorial Deputations took the place of the Provincial, both exercising in the main, the powers conferred by the law referred to, with such additional ones as were given by special acts of Congress.

§ 103. On the 23d Oct. 1835, the Federal system was overthrown, and the *Bases* were established for a new Constitution, by which the States were reduced to the condition of Departments of the Nation, the Territories being also placed on the same footing, and the *whole* Legislative power of the Republic was to be, and by the 3d Constitutional law [art. 1 and 44] was vested in a General Congress. The Government of the Departments was encharged to the Governors with Departmental *Juntas* as their councils [*Bases* of 1835, art. 9 and 10—6th Constitutional law, art. 4,] which were directly subject and responsible to the General Executive or the General Congress, [*Bases* art. 10, 6th Constitutional law, art. 4 and 14]. The general powers of the Governors and Departmental *Juntas* were particularly specified in the 6th Constitutional law, and in the law of 20th March, 1837, regulating the interior government of the Departments [art. 4 to 60], by which the law of 23d June 1813, and other prior laws relating to the political—economical government of the Departments were abrogated [art. 191].

Although the *Bases of Tacubaya*, and the convention of the *Estanzuela* (of 28 Sept. and 6 Oct., 1841) clothed the provisional executive with extraordinary powers, the exercise of which, as to all his acts, was subject to the approbation or reprobation of the first Constitutional Congress, yet no attempt was made to change materially the general law which regulated the interior administration of the departments, but this continued in full force, and was recognized as the rule of government in the departments, even after the adoption of the *Bases Organicas*, [of 13th June, 1843,] and up to the time of the American occupation of this country, except so far as it is in conflict with the said *Bases Organicas*. By art. 15 of the 6th Constitutional law, the Departmental *Juntas*, are prohibited from exercising any powers but such as are therein expressed, which prohibition is renewed in the law of 20th March, 1837, [art. 59.]

§ 104. It is quite clear, therefore, if we bear in mind what has just been shown, that neither the Territorial Deputation, nor the Departmental *Junta*, either with or without the concurrence of the *Gefe Politico*, or Governor, possessed, the power to alienate any part of the national domain, either in favor of individuals or corporations, unless the authority can be found to have been conferred upon them by some law remaining in force in the Mexican Republic. That power is not contained in the law of 23d June, 1813, nor in the 6th Constitutional law which went into operation on the 1st of Jan, 1837, nor in the law of 20th March, 1837, regulating their *general* powers and duties.

We must look for it then in some special law. As the government cannot alienate any part of the national domain or national property of any kind without the consent of Congress, [see ante 80,] it is clearly requisite that the authority must have been conferred by some act of the Mexican Congress, either upon the government in general terms, or upon some particular functionary. If it is conferred upon the government, no subordinate functionary can execute it, until the government has taken the initiative by giving general regulations or special instructions. It belongs to the supreme executive, and not to any subordinate, to direct the execution of the law in such cases. The only legislative disposition of the Mexican Republic, which can be supposed to authorize a gratuitous grant or a donation of national lands to towns or municipal corporations, is the 16th section of the colonization law of 18th August, 1824.

§ 105. There are some special acts of Congress donating lands, and several acts authorizing the sale on account of the treasury of certain lands particularly specified in them, and in some cases where sales have thus been made, towns may have purchased with license from the respective superior authority. But the said 16th section contains the only *general* provision, in virtue of which the government can be considered as authorized to make donations of public lands to towns, and that not directly, but as an incident, without which the power to colonize the Territories could not be executed with effect. I shall admit for the sake of argument that the power may thus have been conferred on the Supreme Government [*incidentally*] by the colonization law; and yet it is perfectly clear, that so much of the power conferred on the Supreme Government, was not delegated to the Territorial or Departmental Governments by the regulation of 21st Nov., 1828, which only authorizes the *Gefes Politicos* "to grant lands in their respective territories, to *Empresarios*, families, or private persons, Mexican or foreign, who may petition therefor for the purpose of cultivating or inhabiting them;" and as no shadow of authority is given them, any action which they might take could not create any equity against the government.

It will not be pretended that the claimant's "Pueblo" was either a private person, a family, or a contractor, [*Empresario.*] I do not doubt that the Territorial Government might, by virtue of the power conferred by the regulation of 21 Nov. 1828, and with the cognizance and consent of the Supreme Government, have entered into a *capitulacion* for founding a new *poblacion*, with any *capitulante* who would obligate himself to present in the character of settlers at least twelve families. But no such case has occurred, and if it had and the contract had been made conformably with L. 6, T. 7, Lib. 4, R. I. [ante § 62], the lands which the contractor would have been required to set apart for the town, that is as its private property, would embrace but a small portion of the tract assigned to him, and must have been segregated from the rest, described, and located, before any right to them could have become vested in the town, [see ante § 80.] But the power to grant lands directly to any corporation, is not given by this regulation, and was not possessed at any time by the Territorial Government.

§ 106. This appears to have been the understanding of the *Gefe Politico* and Territorial Deputation of California, when in the act of 6 Aug., 1834, they *proposed* the "Plan of *propios* and *arbitrios* for municipal funds of the Ayuntamientos of the Territory of Upper California," [Doc. "A,"] which [by Art. 20], was to be communicated to the Supreme Government, for the resolution of the General Congress therein, as appears by an accompanying letter of the same date, directed to the Minister of Relations, and by reference to article 20 of the "Plan" referred to.

The reason of its reference to the Supreme Government is apparent. Three things were proposed, which were beyond the powers of the *Gefe Politico* and Deputation. 1st. The concession of lands for *propios*, and the designation of lands for *ejidos* to towns. 2d. A regulation for the administration of *propios*. This subject being already minutely regulated by *law*, it was beyond the powers of the Deputation to make any alteration in the law, or to introduce any new plan for the management of the funds of *propios*. 3d. It was proposed to impose upon the grantees who should obtain *solares* for their personal use and occupancy, a certain pecuniary fee or duty. This authority is not conferred upon the *Gefes Politicos*, and Deputations, by the regulation of 21 Nov., 1828, nor by any other law or regulation whatever. It was competent, however, for them to propose those measures and communicate the propositions to the Supreme Government, as they did, for the corresponding resolution of *Congress*. It does not appear, however, that the plan was ever adopted by Congress, or that any application was ever made by any town for the assignment of lands under it.

§ 107. I have maintained that the Mexican government, that is the executive, is constitutionally inhibited from alienating any public lands or other national property for any purpose whatsoever, without the previous consent of Congress, which can only be legitimately expressed in the form of a public law, and consequently that any disposition of the *Spanish Cortes*, or of the Spanish Government conferring such power of alienation upon any functionaries whatever, must be considered, *quoad hoc*, as abrogated. But allowing that this were not so, and that all the Spanish laws that were ever in force in the Mexican territory, might be brought into requisition, no authority will be found conferred by any of them upon any Governor or provincial Deputation to make donation of lands to corporations of any kind. It is not given by the decree of 4 Jan., 1813, for it would be in violation of the letter and spirit of that law.

That act was one of a series of radical reforms directed against the accumulation of landed property in the hands of corporations, by which in Spain particularly, a large portion of it had been withdrawn from commerce and from cultivation. It decrees the sale and hypothecation of a part of the public and common lands, on account of the national debt, and the donation of the rest to officers and soldiers, and to citizens who may be destitute of lands. It makes no provision for further acquisitions, by municipal corporations, but on the contrary ordains that those which they already possess shall be reduced to the condition of private property.

§ 108. The regulation and instruction for the Presidios of the Peninsula of Californias, &c., of 24th Oct. 1781, so far as it relates to the Political Government and the settlement of the country [tit. 14,] must be considered as superceded and abrogated by the regulation of 21st Nov. 1828, and the law of 20th March, 1837, [see law 20th March 1837, art. 191 *Dictamen* of the *Junta de fomento de Californias* upon instructions to the superior *Gefe Politico*, p. 11,] although while it remained in force it was only a *regulation* and *instruction*, prescribed by royal authority indeed, but not intended to change materially the general laws of the kingdoms of the Indies, in reference to the establishment of towns and the distribution of lands to settlers. It has hertofore been shown, that L. 7, and 14, T. 7, Lib. 4, R. I. are wholly inapplicable as they only prescribe the *Bases* of contracts to be entered into by the Government with private capitalists for the settlement of new places. The designation of lands for *ejido dehesa*, and *propios* is, according to the said law 14, to be made by those *who have authority* to make the discovery and new settlement or town [*poblacion*,] that is by the contractor according to the terms of his *capitulacion*. L. 1, T. 13, Lib. 4, R. I., contains a general provision relating to the designation of lands for *propios*. But the power to make the designation, is, by the very terms of that law, to be exercised only by the Viceroys and Governors, *who may have royal authority therefor*, and subject to the approbation of the King to whom report is to be made so that he may order it to be confirmed. The royal instruction of 15th Oct. 1754, gives no authority to Governors or any sub-delegates to make donations of lands to towns and the *Ordinanzas de Intendentes* if they contained any such authority were not applicable to California.

§ 109. Where are the *Spanish laws* then in virtue of which, the *Gefe Politico* and Territorial Deputation of California, might make a concession of lands to municipal corporations for *propios?* There are none, but if there were, they not only ceased to have any operation, in consequence of their being repugnant both to the Spanish Constitution and the Constitution of the Mexican Republic, [see ante, § 80,] but were abrogated by the law of 4th Jan., 1813. When the provisions of a law render those of a prior one wholly nugatory, and totally defeat the object of it, I think it may fairly be asserted that the prior law is effectually abrogated. Such is the character and the effect of the law of 4th Jan., 1813. with respect to all prior laws contemplating the donation or concession of lands for *propios:* That law provides that *all* the lands of *propios* and *arbitrios*, both in Spain and all its dependencies, shall be reduced to private property. Did the government which enacted this law intend that any of its agents should still exexercise the power to donate; or did it contemplate any future donation of public lands to towns for *propios*, when in the same instant, by the mandate of the law they must be taken away and converted to private use? Surely not. It intended to abolish the laws which provided for the reservation of lands for municipal purposes. It intended to uproot the system which had depopulated the country and proved destructive to the interests of agriculture. The powerful and conclusive reasons which had led to the adoption of this important reform in the agrarian laws may be seen very elaborately set forth in an an "Informe" of the *Sociedad Patriotica* of Madrid, in reference to the *expediente* submitted to it by the Spanish Government upon the "*ley agraria*,"* presented on their behalf by *D. Gaspar de Jovillanos*, and also in the report of the committee on agriculture made to the *Cortes* on the 22d Feb., 1812; containing the project of this law of 4th Jan., 1813, [12 *Diario de Cortes*, 88,] "The committee," [as they say] "find themselves deeply impressed with the same views which have governed Messrs. *Gordillo, Terrero, and Oliveros*, and the Minister of Marine, *ad interim.* Your majesty [*the Cortes*] has recognized them more than once, and they are now axioms with all lovers of the public weal. The preservation of the *baldios* which have erroneously been regarded as most useful to the *pueblos*, is really opposed to their felicity, and is one of the principal causes of the diminution of our population, agriculture and herds.

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* The *Informe*, after having treated largely of the expediency of reducing the *common lands* to private ownership and use, (see extract, ante note to §55,) proceed to recommend the same measure in regard to the lands which the towns, or some of them, possessed with title, under the character of *propios*, expressing the views of the Society in the following terms:

"Perhaps it will be convenient to extend the same measure to the *tierras consejiles*, so as to surrender them up to individual interest and place them in a state of useful cultivation. If, on the one hand, this property is as sacred and worthy of protection as that of private persons, and if it is the more worthy of attention inasmuch as its revenue is destined to the preservation of the civil State and municipal establishments of the councils (*consejos*); on the other hand, it is difficult to conceive why, until this time it has not been attempted to unite the interest of the *Pueblos* themselves with that of their individual members, and to derive from these lands a source of subsistence, and of public wealth. The *tierras consejiles* divided and distributed in *enfiteusis* or *censo reservativo* without ceasing to be the *mayorazgo* of the Pueblos, nor to supply most abundantly all the exigencies of their municipal police, would afford room for the establishment of a great number of families, which employing individual interest upon them, would cause them to yield considerable products with great advantage to themselves and to the community to which they may appertain.

"Your Highness has felt the force of this truth, when by your dispositions of 1768 and 1770 you ordered the distribution of the municipal lands to the *pelentrines* and small farmers of the Pueblos But let it be permitted to the Society to observe that these dispositions would receive greater perfection if the distribution should be made in all parts, and of all the municipal lands and property; if it should be made by means of *enfiteusis* or *censo reservativo* and not by temporary renting, although it should be for an indefinite time; and in fine, if the citizens should be afforded the opportunity for the redemption of their pensions, and the acquisition of the absolute property in their *suertes*; without these qualities the effect of so salutary a measure will be always partial and dubious; because it is only a certain and secure property that can inspire that lively interest without which the *suertes* will never be advantageously improved; that interest which identified with all the desires of the proprietor, is the first and most powerful stimulous to banish sloth, and urge him to hard and unceasing toil.

"Nor would the Society think it inexpedient that absolute and unconditional sales should be made of these lands. It is certainly a very strange maxim which so religiously reserves these lands, at the same time that it deprives the communities of the most useful establishments. The draining of a lake, the navigation of a river, the construction of a port, a canal, a road, a bridge, accomplished with the price of the *propios* of a community, favoring its agriculture and industry, facilitating the abundant supply of its markets, and the exportation of its products and manufactures, might permanently secure the felicity of its whole district. What if the community should sacrifice its *propios* for such an object? It is true that the citizens would have to contribute with taxes to the preservation of the municipal establishments. But if, on the other hand, they should be enriched, would it not be better for them, having four, to contribute two, than neither to have nor to pay anything? For this reason, although the Society finds more justice and greater advantages in the *repartimiento* of these lands, it would not disapprove the absolute sale and alienation of some portions, where their abundance and the avidity of purchasers should induce a preference of that mode. The price of them entering into the public funds would supply to the communities a larger revenue, more easy to be administered, and attended with less risk; the which, appropriated to works of necessity or known utility, would bring to the *Pueblos*, benefits, much greater, more secure and permanent, than those which is produced by the ordinary investment of the municipal revenues.

"The custom of giving to the *Pueblos dehesas comunes* to secure the breeding of working cattle and colts, may present some modification of the generality of this measure. But if the necessity of such resources finds some support in the present subversion of our rural police, let it not be doubted that it will entirely disappear when this branch of legislation shall be brought to perfection, for then they will not only be unnecessary but injurious. Working cattle will always deserve the first care on the part of farmers, and in defect of public pasturage, there will be none who will not secure within their own *suerte*, in mowing grounds, if the climate permit, or in *dehesas*, if not, all that may be necessary for their herds. What else is seen in those provinces, the most populous, and best cultivated where such *dehesas* are unknown?

"It is very desirable indeed to preserve the race of good and generous horses for the army. But can it be doubted that private interest will perfect this branch of stock-breeding better than the laws, and municipal establishments? That the scarcity itself of good horses, if such should be a monentary result of the *repartimiento* of the *dehesas de potros* (town pastures in which horses are bred), will be the greatest stimulous to breeders, by the increase of prices consequent thereon? Why are the best Andalusian horses reared with so much pains in private pastures, unless because they are well paid for? Has the spontaneous increase of mules any other stimulus than the utility of this enterprize? How can this truth be doubted by any one who reflects that they are bred with the greatest care in the fresh pastures of Asturias and Galicia—that the colts are brought from thence to be sold in the fairs of Leon, that they are taken afterwards to be fattened on the dry and rich herbage of Mancha, in order to stock the stables of the *Corte*, (Madrid and its district). Thus it is that industry is stimulated, circulates, and resorts wherever interest calls, multiplying individual property in order to give a grand impulse to agriculture.

"Individual interest being disconnected from these extensive lands, *the community of* enjoyment has sterilized, and rendered them generally useless to all. They are treasures abandoned, which converted into private property would cause a vast increase of population, and become a source of wealth and prosperity to the State? Even the lands of *propios*, although less extensive, and somewhat better regulated in their enjoyment, experience the defect of improvement which is inseparable from all common property. In the possession of individuals they would produce incomparably more, and thereby much greater benefit would result to all the *pueblos* than by preserving their municipal possessions [*posesiones consejiles*,] the more so as without the necessity of preserving them, they can by other means secure the funds required for their municipal expenses."

§ 110. The law of 4th Jan. 1813, destroyed the whole system both of town commons and lands of *propios.* After it was promulgated no authority existed anywhere for granting, assigning, or reserving lands to towns, for any such purpose. Neither the King of Spain [while the Constitution was in force] nor the supreme Executive Government of the Mexican Republic, after its Constitution was first established, and much less any subordinate functionaries, could grant or authorize the reservation of any public lands for that purpose, without being specially empowered by some subsequent law. In the sovereign States, under the Federal system, the laws on this subject may have varied, because the general powers of legislation were vested in the local Congress of each, and the legislative authority of the Federal Government did not extend to subjects connected with the interior administration of the States. The laws enacted by the States may likewise have remained unrepealed, and consequently have continued to govern in matters of this kind, as well as others, after they were reduced to the condition of Departments, or mere districts and fractions of the national territory under the consolidated central government. It will be understood therefore that my remarks are only applicable to those Departments which had previously existed as territories, and over which consequently, no legislative authority but that of the General Congress had ever been exercised after the independence. Such was the condition of California. Texas on the contrary, [with Coahuila,] was a sovereign and independent State, governed by its own Constitution [adopted 11th March 1827] and laws, and having successfully resisted the centralization scheme, was never effectually reduced to the subordinate rank which the other Departments of the Republic occupied. For these reasons the rules which govern cases in that country, would would frequently be inapplicable in this. The designation of lands for *ejidos* in the Department of Sinaloa, under a decree or regulation of the Governor formed with the concurrence of the Junta took place under and by virtue of an express *law* passed by the *Legislature* or Congress of the *State* before it became a department, and which law not being afterwards repealed by the General Congress, remained in force, according to the principles laid down by the council of Government in the *informe* which has been cited [ante § 5]. No general act of the Mexican Congress has authorized any authorties to grant the lands or property of the nation to any corporation whatever, and therefore, it will probably be found that in all cases where such property has been acquired by municipals corporations in the Territories, it has been granted by a special act of Congress. At all events, it is perfectly clear that the Territorial Governors and Deputations were never empowered to make such grants, [See ante § 105].

§ 111. There is then no title for the claimant real or imaginary. Even the creations of that extraordinary fancy, which, with the assistance of the "able researches of counsel" in the case of Cohas *vs.* Roisin el al., discovered secrets that were hidden to all the world, and which from the impossible nature of the facts assumed, must remain forever hidden, vanish before the light of truth and reality.

This result is no more than might have been expected. It seems to have been known several years ago. The author of an abstract of *Alcaldes* grants, entitled "Land Titles in San Francisco," observed that he was not aware that any absolute grant of territory was ever made to this town, although himself and others had diligently searched for it. Greater benefits might have resulted by giving his researches some other direction. For my part I have to confess that I have never looked after *that* grant; for to suppose it to have any existence but in the vague conception of those not well acquainted with the subject, would be in contradiction to the laws, customs and uniform policy of the country from which it must have been derived. If the search has been fruitless, no wonder, for nobody ever said that a grant had been made. Let us hereafter leave *that grant* to its repose in what may be considered the archives of all such documents—in the limbo of things lost on earth, and which will not be found in heaven.

§ 112. In the absence of all proof of any legitimate right or title, and in the face of the clearest evidence that the claim is unfounded, some support is expected from the 14th section of the Act of Congress of March 3, 1851, entitled "An Act to ascertain and settle private land claims in the State of California;" which declares "that the provisions of this Act shall not extend to any town lot, farm lot, or pasture lot, held under a grant from any corporation or town to which lands may have been granted for the establishment of a town by the Spanish or Mexican government, or the lawful authorities thereof, nor to any city, or town, or village lot, which city, town, or village existed on the seventh day of July, eighteen hundred and forty-six: but the claim for the same shall be presented by the corporate authorities of the said town, or where the land on which the said city, town, or village, was originally granted to an individual, the claim shall be presented by or in the same of such individual, and the fact of the existence of the said city, town, or village, on the said seventh of July, eighteen hundred and forty-six, being duly proved, shall be *prima facie* evidence of a grant to such corporation, or to the individual under whom the said lot-holders claim; and where any city, town, or village shall be in existence at the time of passing this act, the claim for the land embraced within the limits of the same may be made by the corporate authority of said city, town, or village."

§ 113. The provisions of this section afford no assistance to the *city's* claim. How is it that the provisions of this act, and what "provisions" of it shall not extend to any town lot, &c.? Undoubtedly, it will not be contented that *none* of the provisions of the act extend to the case contemplated in the 14th section, for if that were the case, it is difficult to see what advantages could be gained by presenting any claim under it. Without invoking the aid of the other sections of the act, or some of them, it would be impossible for the Board to take any action upon it, or for the claimant to derive any benefit from a confirmation. But "the provisions of this act," contained in the 8th section, which requires "that *each* and *every* person claiming lands in California, by virtue of any right or title, &c. shall present the same to the said commissioners when sitting as a board, together with such documentary evidence and testimony of witnesses as the said claimant relies on in the support of each claim, shall not extend to any town lot, farm lot, or pasture lot, held under a grant *from* any *corporation* or town *to which lands may have been granted* for the establishment of a town by the Spanish or Mexican Government, or the lawful authorities thereof, nor to any city, or town, or village lot, which city, town or village existed on the seventh day of July, 1846. but the claim for the *same* [same what? the same town lot, farm lot, or pasture lot, or city, town, or village lot, certainly is meant] "shall be presented by the corporate authorities of the said town," [not always but] "or where the land on which the said city, town, or village stands, was originally to an individual, the claim shall be presented in the name of such individual, and [in such cases we, the American Government will not require the hundreds and thousands of lot holders in the different towns, in the outset to prove title in their grantor, but so far as regards their respective claims,] the fact of the existence of the said city, town, or village on the said seventh day of July, 1846, being duly proved, shall be *prima facie* evidence of a grant to such *corporation*, [if the lot holders have derived their title from the corporation,] or to the individual under whom the lot holders claim, [where the land on which the said city, town or village stands, was originally granted to an individual] and where any city, town or village shall be in existence at the time of the passage of this act, the claim for the land embraced within the limits of the same may be made by the corporate authority of the said city, town or village;" but in this case, no presumption of any grant to said town, nor to the individuals whose claims may be presented by it, shall be allowed for three substantial reasons:

1. The town may have been founded or incorporated since the annexation of the country to the United States, in which case, it would be absurd to presume that any grant had been made to it by the Spanish or Mexican Government.

2. Or if founded before, the land may be claimed by the town in its own right, or may be claimed in part by individuals, or wholly by different individuals, or various individuals may present distinct claims to the same land, conflicting with that of the town and conflicting with each other; in which case such *prima facie* evidence, operating equally in favor of all, would in the one case, contradict and destroy itself, in the other it would give all claimants in towns an undue advantage over all others without any reason for it, or if a discrimination were made in favor of the town, against individual claimants, or in favor of one private claimant against another, such a discrimination would be in violation of the treaty, as well as the constitutional rights of claimants, and would moreover be infamously unjust in itself.

3. Because if the town has been built upon lands of the United States, Congress has already provided in the act of 23d May, 1844, and that of 3d March, 1853, that the said lands shall be entered at the proper land office for the several use and benefit of the occupants thereof, according to their respective interests.[*] For these reasons, with others too obvious to require the mention of them, and not being able just now to determine the exact dates, and boundaries, and the precedence that ought to be fixed and allowed to grants that may be pretended under this last clause, we must exclude the claimants from the benefit of any

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[*] *An Act for the relief of the citizens of towns upon the lands of the United States under certain circumstances.*

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That whenever any portion of the surveyed public lands has been, or shall be settled upon and occupied as a town site, and therefore not subject to entry under the existing pre-emption laws, it shall be lawful, in case such town or place shall be incorporated, for the corporate authorities thereof, and, if not incorporated, for the judges of the County Court for the county in which such town may be situated, to enter, at the proper land office, and at the minimum price, the land so occupied and settled, in trust for the several use and benefit of the occupants thereof, according to their respective interests: the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such rules and regulations as may be prescribed by the legislative authority of the State or Territory in which the same is siutated: *Provided*, That the entry of the land intended by this act, be made prior to the commencement of the public sale of the body of land in which it is included, and that the entry shall include only such land as is actually occupied by the town, and be made in conformity to the legal subdivisions of the public lands authorized by the act of twenty-fourth of April, one thousand eight hundred and twenty (April 24, 1820), and shall not in the whole exceed three hundred and twenty acres; *and, provided also*, That any act of said trustees, not made in conformity to the rules and regulations herein alluded to, shall be void and of no effect; *and, provided also*, That the corporate authority of the the town of Weston, in the county of Platte, State of Missouri, or the County Court of Platte County, in said State, shall he allowed twelve months, from and after the passage of this act, to enter at the proper land office, the lands upon which said town is situate. 5 United States Stat. at large, p. 6.

Approved May 23, 1844.

An Act to provide for the Survey of the Public Lands in California, the granting of Preemption Rights thereon, and for other purposes.

Sec. 8. And be it further enacted, That the public lands, not being mineral lands, occupied as towns or villages, shall not be sub-divided or subject to sale, or to be appropriated by settlers, under the provisions of this act; but the *whole of such lands*, whether settled upon *before or after* the survey of the same, shall be subject to the provisions of the act entitled "An Act for the relief of the citizens of towns upon the lands of the United States, under certain circumstances, approved May 23, 1844, except such towns as are located on or near mineral lands, the inhabitants of which shall have the right of occupation and cultivation only, until such time as Congress shall dispose of the same; nor shall any lands specially reserved for public uses be appropriated under the provisions of this Act." U. S. Statutes at large, for 1852–'53, p. 247.

Approved, March 3, 1853.

extraordinary legal presumption. This is to my understanding, the true reading of the law, and no other construction can be put on it without rendering it wholly inoperative.

§ 114. Nothing can be clearer than that the first part of the section which speaks of *town lot, farm lot, pasture lot, or city, village, or town lot*, was not intended to give any advantage to any individual or corporation claiming lands, by virtue of any right or title derived *directly* from the Spanish or Mexican government, but like the Act of 23d May, 1844, and 3d March, 1853, which makes it the duty of the municipal authorities of corporate towns to enter at the proper land office, all the lands within their limits for the several use and benefit of the occupants thereof, according to their respective rights and interests, so this section makes it the duty of the corporate authorities of every town, to which land may have been granted by the Spanish or Mexican governments, and every town which existed on the 7th day of July, 1846, whether lands had been granted to it or not, to present before the Board in a general petition all the claims of lot holders within its limits, and as to those of them who hold under the corporation, a grant shall be presumed to have been made to the corporation, and as to those who hold under an individual, a grant shall be presumed to have been made to the individual.

The existence of the town on the 7th of July, 1846, is not to be *prima facie* evidence of a grant to the corporation in all cases, but it is to be "*prima facie* evidence of a grant to such corporation *or* to the individual under whom the lot holders claim." It was the convenience of the government as well as the numerous claimants in towns which probably induced this provision, and the desire to save the lot holders from the great annoyance and expense which would be occasioned by requiring them to present and prove up their claims, each one separately.

While the bill constituting this law was under discussion in the Senate, Mr. Berrien from the Judiciary Committee, by which it had been reported, explained fully the object and meaning of all its various provisions. I shall refer only to the remarks which were made upon the 14th section. In the first place Mr. Berrien proposed [Cong. Globe, 347,] the following amendment, in the tenth line of the 14th section: to insert after the word "towns," the words, "or where the land on on which said city, town or village is situated was originally granted by an individual, the claim shall be presented by or in the name of such individual," and said, "the object of the section is to prevent the provisions of this act from applying to any town lot, farm lot, or pasture lot held under a grant from any corporation to which lands may have been granted for the establishment of a town by the Spanish or Mexican government, or the lawful authorities thereof, nor city, town, or village lot, which city, town, or village existed on the 7th day of July, 1846.

"My information is that besides the city, town and village lots, constituted under grants from the Spanish and Mexican Government, there are places existing in California which have been founded by individuals, and which rest upon the title of an individual. The object of this amendment is to relieve each individual lot holder in each case from the necessity of going before these Commissioners, and pursuing his case to the Supreme Court, allowing the claim to be presented by the Corporation, and in the next place, by or in the name of the individual under whom the lot holder holds."

This amendment was agreed to, and Mr. Berrien then proposed another to the same section, by inserting after the words "forty-six," the words "*being duly proved*," which was also agreed to, and Mr. Berrien then proceeded to explain in detail the various provisions of the bill, which, he said, "the committee had draughted with a view to carry out what was supposed to be the intention of the Senate." In relation to the 14th section, he remarked:

"The next provision of the Bill regards town lots. In the discussions which had been before the Senate, the other day, we were informed that there were cities and towns in California, to which lands had been granted by the Spanish and Mexican Governments; and that the corporate authorities of those towns were authorized to issue to individuals grants for town lots, building lots, and for farm and pasture lots. The Judiciary Committee believed that it would not be proper to subject *each individual lot holder* to the necessity of sustaining his claim to the town, farm or pasture lot, but deriving the title from the corporate authority, that it would be sufficient if the claim was presented in the name of the corporate authorities."

"It was further found that there were certain cities, towns and villages in California, the land constituting the sites of which, had not been granted by the Spanish or Mexican government, but by an individual, who has been the founder of the city, town, or village, or who has conveyed to individuals the lots which they hold, and upon which property of vast value has been erected. It seemed to the committee that this also required to be provided for, and, therefore, the object of the 14th section of the bill is, to declare that in this case it will be sufficient for the claim to be presented by the corporate authority of the city, town, or village, or the individual, where the title was derived from an individual, under whom the lot holders hold. And in order to give security to those lots holders, who hold under the faith of these grants from the Mexican government, or relying upon the individual title under which they hold, have erected in many cases extensive and valuable buildings, the Bill provides that the "existence of such city, town or village on the 7th day of July, 1846, shall be *prima facie* evidence of a grant to such corporation, or to the individual under whom the said lot holders claim."

It was on a subsequent occasion proposed by Mr. Benton to amend the Bill by making a donation of all vacant lands within the corporate limits of towns to the corporation which was resisted by Mr. Berrien who said that the sole object of the Bill was not to confer titles but to ascertain them, and the amendment was not agreed to. [Cong. Globe, p. 427.]

Mr. Senator Gwin always opposed in the Senate any donation to towns, and said, that "he was against any legislation on the subject," but advocated a liberal policy towards the actual occupants and improvers of lands and lots. [Appendix to Cong. Globe, 31st Cong., 2d Session, p. 58 and 130.]

§ 115. It is true this presumption of a grant to the town is unnecessary for the protection of individual lot holders. It would be sufficient that the municipal or other functionaries had authority to grant the lots claimed, and this ought to be presumed if they exercised it, in the absence of proof to the contrary. The power to grant in no manner arises from the right of property in the town, *partido*, district or department in which the granting officer exercises his functions, but depends solely upon the authorization of government. Congress, however, seems to have supposed that to sustain the validity of grants by municipal officers, the town must have the property in the lands granted, whereas the truth is just the reverse, for having the property, by the Spanish and Mexican law, they could not alienate it without special authority from government in each individual case, given upon full cognizance of the cause, the reasons and the necessity (vide ante, § 22, 23 and 95, note). But Congress seems to have been under a different impression, and therefore, to save the lot holders, said, that when they came before the Board claiming under a town, or an individual who previously owned the lands on which the town had been built, the government would consider the fact of the existence of the town on the 7th of July, 1846, as *prima facie* evidence of title in their grantor, to avoid the necessity of proving up the same original grant in numerous cases.

§ 116. But in order to this, the existence of the town at that date must be clearly proved, and must not be left to depend on conjecture or presumption, but must be proved by legal and competent evidence. Every fact, and every act, which consists in records and documents, must be proved by the records and documents themselves, and the previous existence of these, and the loss of them must be clearly established before any secondary evidence can be admitted. The existence of the town as a *corporation* must be duly proved, not some settlement or body of citizens concentrated at some point, however numerous, but their erection into a body politic, and corporate by competent authority, and in the form prescribed by law. Because this section speaks of grants from any corporation or town, and makes the fact of the existence of the said city, town or village on the 7th day of July, 1846, when duly proved "*prima facie* evidence of a grant to such *corporation*, or to the individual under whom the said lot holders claim." The claims of the lot holders (that is the claim for any city, town or village lot) though derived from an individual to whom the lands on which the town is built was originally granted, may be presented by the town in the name of the individual, if the individual does not himself present it. It is to be presented *by* or in the *name* of the individual, and if the private interest of the individual should not induce him to present the claim, or should he be dead or absent, or should neglect it from any cause, it becomes the public duty of the corporation to protect its own citizens by presenting it in his name.

§ 117. It is the duty of the corporate authorities of every town which existed on the 7th day of July 1846, to present the claim of its citizens for all the lots which they hold under a title derived previous to that period, whether by a grant from the town or from an individual, and in such case this important advantage is gained, that the government will consider a *prima facie* title as made out in favor of the respective lot holders, claiming under the town, or the individual on whose lands the town was built, will consider the fact of the existence of the town on the said 7th July, 1846, as *prima facie* evidence of a grant to such corporation or to the individual under whom the lot holders claim.

This duty the City Fathers of San Francisco have wholly neglected. They have abandoned the lot holders. They have not presented, acknowledged, or even referred to the claim or right of a single individual lot holder. They have assumed a position adverse and hostile to all. The law speaks of those claiming by grant *from* a corporation or town, or *from* an individual on whose land the town has been built, and in that spirit of benevolence and liberality which characterises the Federal Government, aims to protect the individual claimants and occupants of property in all the towns of California. But this protection to property, if it was once attainable, has been lost by the negligence of the corporate authorities of San Francisco. They have abandoned their constituents. The corporation claims all the lands within the limits of the city of San Francisco, and for many miles beyond them, "except so much thereof as had been granted by the authorities of said Pueblo in pursuance of law."

§ 118. I will suppose that all which had been granted at all previous to the date referred to (7th July, 1846,) had been granted "in pursuance of law," which must be presumed, yet all these grants do not exceed sixty or seventy lots, leaving three thousand surveyed lots below Larkin and Johnston streets, which cannot be estimated at less than thirty millions of dollars exclusive of improvements, not excepted from the claim of the corporation. But suppose that a confirmation and patent to the corporation would inure to the benefit of those who hold under grants made "in pursuance of law," subsequent to the 7th of July, 1846 and before this city was chartered, how few of the lot holders would be included in that category, even supposing that the Mexican law and instructions and authorizations of Government remained in full force? In the first place, all the holders of property within 200 varas of the beach would be excluded. The foundations of property worth at this time twenty millions of dollars, including improvements, would be overturned, for to this property our act of the Legislature confirming "Alcaldes" grants, does not extend, and every body knows that no municipal officers ever had any authority whatever to grant lots within these limits. If the land were confirmed to the city, the occupants of this property who have expended so many millions in improvements on it. would derive no benefit from the confirmation, because they do not hold under the corporation by a lawful and valid grant, which it would be obliged in law to acknowledge.

§ 119. In the next place, it is equally clear, that every grant, if made *in pursuance of any law*, must, to have any force or validity, and to confer any right of property, have been made to a resident citizen for his personal use and occupancy, and that he must have enclosed, built upon, inhabited, cultivated or occupied it in his trade, profession or business, and if he occupied one lot, it is quite clear that he could not occupy two at the same time, and if he could, two could not lawfully have been granted to him. Who told an *Alcalde*, *Ayuntamiento* or Justice of the Peace of San Francisco, to do what the Supreme Government of the Mexican Republic could not, to grant, sell or give, five, ten, thirty or fifty town lots to a single individual in a day? Not the law, certainly. No authority, ancient or modern, can be found for such a scandalous proceeding. It is unnecessary to speak of the legal requisites in making grants which must frequently, if not generally have been omitted by American Alcaldes through ignorance of the laws under which they were acting. Disregarding forms, and looking at the substantial and unmistakeable language and requisites of the law, it is certain that not fifty grants made since the war, out of the thousands which have been mentioned below Larkin and Johnston streets, would possess any semblance of legality such as the present corporation would be bound to acknowledge. Here a confirmation to the city would unsettle the titles to at least twenty millions of property, nearly all of which has long been occupied and improved at the expense of many millions more.

§ 120. There is another class of void titles to lots, which would immediately be brought upon the arena of legal strife, if this claim could be confirmed, the number of which cannot be easily calculated, but *their name is legion.* I mean the grants made *nunc pro tunc.* Those who have resided here for the last seven years, and been acquainted with the public records, can appreciate what I say. Then come the grants made by Alcaldes to themselves through the intervention of third persons, and the distribution made by the *Ayuntamientos* of the years 1847, 1848 and 1849 among themselves, all of which are contrary to the express letter of the law, as well as to the well recognized principles of equity and morality. It is in vain to say that by some future action of the corporation, the actual occupants and improvers of this vast amount of property would be secured in their possessions. It is better to "let well enough alone."

If this claim is rejected, they are already secure by the provisions of the act of Congress, of May 23, 1844, and March 3, 1853, which give the land to the actual occupants at the *minimum* of $1.25 per acre, and if any future action be requisite, who would not rather trust to the just and equal legislation of Congress, than be left at the mercy of a corporation, whose ill adapted and erroneous policy on this subject has already destroyed all public confidence.

§ 121. There is, however, one class of titles that would be effectually and irrevocably settled by a confirmation to the city, I mean those who hold under judgment sales, commonly known as "Peter Smith" proprietors. The many hundreds of lots below the streets which I have mentioned, and the fifty or sixty thousand beyond those streets would become their lawful prey. I cannot blame them for pouncing upon it, when it is within their reach, but I would ask what protection is to be expected from a corporation which has thus abandoned its constituents to suffer the loss of more than ten millions of property.[*]

It is matter of public history, that when the *Ayuntamiento* of 1849 was installed, this town was free from debt. That body and its successors, after disposing of more than twenty millions of landed property within the short space of four years, and suffering the sacrifice of nearly all the rest within the city limits, have left us, as a slight token of remembrance, a debt to cancel of two millions of dollars.

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[*] *Statement of Lands sold on Judgments according to the evidence introduced in this case before the United States Board of Land Commissioners.*—The property within and adjoining this city which has been sold at sheriff's sales, on executions against the city, is as follows:

On the 8th of July, 1851, 2 fifty vara lots (and 5 wharves, all the wharves of the city then built, or nearly, except Commercial or Long Wharf.)

On the 19th of September following, 40 one hundred (or 160 fifty,) and 55 fifty vara lots, making in all 215 fifty vara lots, were sold, all of which were held either under Alcalde grants, or by the Commissioners of the Funded Debt of the city.

On the 14th of June, A. D. 1851, the sheriff sold 30 entire blocks and 7 one hundred vara lots, besides 102 water lots.

On the 26th Movember, 1851, the Sheriff sold 24 entire blocks, comprising about 300 fifty vara lots, and the entire number brought only $1275, as appears on the official books of the Sheriff.

On the 30th January, A. D. 1852, the Sheriff sold 16 fifty vara lots, 33 hundred vara lots, and 15 entire blocks, and a piece of land near Johnston street and Mission Creek, containing 5 blocks making in all about 400 fifty vara lots, and also at the same sale, three large tracts of land extending in a belt two miles wide, entirely around the surveyed limits of the city except on the water, which leaving out so much of it as is covered with water, may be described as follows: Beginning at the intersection of Larkin street with the bay, and running thence along the natural high water mark of the bay, to the distance of two miles in a straight line, thence south on a line parallel to the line of Larkin street, about four and a half miles, thence east to the said water mark to the south of the city, thence along said water mark to a point two miles south of Clay street, thence to the junction of Folsom and Corbett streets, thence along Corbett to the line of Larkin street, and along Larkin street to the place of beginning. Only a trifling portion of the water property around the city which has been sold under the same executions and judgments is included in the above description.

Note.—It is believed that the whole amount for which the foregoing property was sold, will be considerably less than $10,000.

§ 122. It has been suggested that the rejection of this claim would involve the city of San Francisco in difficulty on account of the numerous grants and sales of lots since the 7th July, 1846. As to the period which elapsed previous to the incorporation of the city, it is sufficient to say, that if a municipal corporation existed during that period, and it were the owner of lands, none of the municipal authorities had any power, to either sell, or grant, or encumber any part of such lands, and if they attempted to do so, the grant, sale, or encumbrance would be void, and the functionaries attempting to execute them would be *personally* liable for all consequences both to the corporation and the other parties injured. Such is unquestionably the Mexican law, which must govern this subject during the period just referred to. [Ante § 22, 23 and 95, note : § 46.] The corporation might recover its lands, and the grantees or incumbrancers would have to look to the delinquent officials personally, for their redress. So that a confirmation would be the most disastrous result that could take place to almost every lot holder in the city, and still more so to the Alcaldes and members of the Ayantamientos of 1847, 1848, 1849 and 1850. Nothing but a rejection of the claim, can save them, in which event, neither the officials can be arraigned by the corporation for their mal-feasance in relation to property not its own, nor the lot holders, by any attempt of the corporation to re-vindicate its property. The lot holders will then be secure under the Act of Congress. As respects any sales made by the *city*, no liability on the part of the corporation can result for two reasons. First, it is presumed that the conveyances have been, like almost all conveyances of public property, without warranty. *Secondly*, the occupants who have purchased from the city, as well as those who may have purchased from other parties, are protected by the Act of Congress before referred to, and as they are not liable to be evicted, no action would lie, or be even attempted against their vendor, even though the conveyance has been by warranty. In California it is presumed that no person has been foolish enough to purchase property, which was in the adverse possession of other parties, possession having always been regarded here as almost the only evidence of ownership, and if some have adventured their funds in the purchase of adverse claims from any person or corporation, out of possession, the loss of them in consequence of having engaged in transactions which are reprobated by the laws of all well regulated communities, gives them no claim to any favorable consideration.

§ 123. It will thus be seen that the position taken on the part of the Government, is not in conflict with any rights of property, or claim to the possession of any property. It aims to disturb no individual in his possessions. It proclaims peace and tenders permanent security to all. At one cent per vara for lands now valued at $1000 per vara, it offers a patent to every occupant of lands in San Francisco, without respect to persons.

If we regard the interest of this great city as identical with the aggregate interests, security and welfare of its inhabitants, no event is more ardently to be prayed for than the rejection of this claim.

The result seems me to be inevitable, but if it *could* take place as soon as submitted, so many more days of peace would be given to the citizens, and property would be secured to its possessors upon a basis never more to be disturbed. It would be a year of jubilee to all except those who live by plunder. It would put an end to disputes about titles, and thereby destroy the occupation of some who make "gain by sooth-saying." It would cancel all outstanding claims, and relieve the whole population of actual occupants, and improvers of real property on which they have expended so many millions, from all fear of future molestation.

It would produce no panic anywhere but among the holders of Peter Smith stock, whose visages would very naturally exhibit for a few days, an aspect somewhat elongated. But this would be only temporary. They would soon recover their wonted cheerfulness in prospect of some new adventure, and one universal smile of satisfaction and contentment would lighten up the faces of the entire community.

POINTS OF FACT AND PROOFS

IN REGARD TO

LAND CLAIM, No. 280,

OF THE

CITY OF SAN FRANCISCO:

BEFORE THE

BOARD OF U. S. LAND COMMISSIONERS.

SAN FRANCISCO:
WHITTON, TOWNE & CO., PRINTERS, EXCELSIOR JOB OFFICE,
No. 151 Clay Street, third door below Montgomery.
1854.

lection it is a copy of the document received by me as above stated. I don't know where the original of this document is, if it is in existence. I put it among the archives of the Pueblo, as I did other documents of that character."

5. Document No. 5, (same) from Governor Figueroa, dated 31st January, 1835, to "Senor Alcalde, Corstl, de San Francisco Asis," recognizing his appointment of an Alcalde for Contra Costa. Francisco de Hara was Alcalde at this time and resided in the Presidio. Testimony of Sanches.

6. Document No. 6, (same.) José Castro to "Sr. Alcalde de San Francisco de Asis," notifying that the Territorial Deputation in its session of the 22nd of September, had approved that the Ayuntamiento of this Pueblo have power to grant house lots of one hundred varas in the place called Yerba Buena. Dated Monterey, October 26, 1835.

Francisco Sanches, a witness for the United States. Question by the counsel for the City. "Look at document No. 6, attached to Vallejo's deposition and say what locality is represented in that address."

Answer.—At that time the Alcalde, to whom it is addressed, was at the Presidio. José Castro well knew where the place is.

7. Document No. 7, (same) Nicholas Gutierras to "Sr Alcalde de San Francisco de Asis;" dated January 19th, 1836, requiring a report from the tribunals of justice.

8. Document No. 8–9, (same.) Election returns December, 1837 and January, 1838, for election of officers "in the Pueblo of San Francisco de Asis."

9. Document No. 10, (same.) Order of Governor Alvarado, dated June 17th, 1839, directing an election under the law of the 30th November, 1836, of an "Elector" for several "Pueblos, by name, among them that of San Francisco." § 3 and § 4 shows that reference was made, not to San Francisco de Asis;" but to the "Pueblo" of the "Port" of San Francisco.

10. Document No. 11, (same.) Governor Micheltorena, on the 14th of November, 1834, published an order as coming from the departmental Assembly relative to the law of Elections and ordering them in the "Pueblo," among others, that of "San Francisco," for the election of a 1st and 2nd Alcalde. See § 2.

11. Docmuent No. 12, (same.) "Section of San Francisco," secondary election in the hall of the tribunals for an Alcalde of first nomination was elected for the ensuing year 1845, to take office on 1st of January, of that year, dated "San Francisco, December 22, 1844," addressed to "citizen Juan N. Padillo, Alcalde elect of first nomination.

12. Document No. 13, (same.) Letter of Manuel Jimeno to "Senor Alcalde de San Francisco," dated July 14th, 1844, enclosing an edict establishing companies of militia.

13. Document No. 14, (same.) An order from Micheltorena to Ensign Don Juan Prado Mosa to present himself with twelve or fifteen men of his command to "the Alcalde of 1st Instance, of Yerba Buena," &c.; addressed to "Senor Alcalde de San Francisco," dated 11th March, 1844.

14. Document No. 15, (same.) Letter from Jimeno, dated January 2nd, 1844, addressed to "Senor first Alcalde of the Port of San Francisco, fellow-citizen William Hinkley," who at the time resided in Yerba Buena.

15. *Vallejo.* "There was a municipal organization of the Pueblo of San Francisco from the period of the election above mentioned (December, 1834,) to the time of the occupation of California by the United States. The partido of San Francisco under the jurisdiction of the Ayuntamiento, comprehended the County on this side of the Bay as far as los Pulgas, and on the other side of the Bay to the rancho of the Peralto's and Pinale. The jurisdiction of the Ayuntamiento extended only to the limits of the Pueblo. The Partido was under the jurisdiction of civil Alcaldes."

16. *Alvarado.* "I recollect the circumstances connected with the establishment of the Ayuntamiento of San Francisco. It appears to me the Ayuntamiento was established by the authority of Figueroa. I recollect that the Political chief, Figueroa, with the Territorial Deputation determined to establish an Ayuntamiento in San Francisco, and by virtue of this decree it was established. I knew this place where the city of San Francisco now stands, before July, 1846, by the name of the Pueblo of Yerba Buena. At the Presido in 1834, or about that time, there might have been forty persons, more or less, not

including soldiers. I think there was an Alcalde for the first time in 1834. I do not recollect the day or month when the Ayuntamiento began to hold its sessions there, but I believe it was in 1834. The Pueblo of Yerba Buena was known by the people of the County by the name of Yerba Buena, but by persons who came by sea it was called the Port of San Francisco."

17. *Francisco Sanches.* "In 1835, the Pueblo of San Francisco was at the Presidio. In 1837, at the Mission. The Plaza spoken of in Document No. 3, is at the Presido. There was a Pueblo there in 1835. The election spoken of in Document No. 2, 7th December, 1834, was for an electoral Junta held at the house of the Commandante. No. 3 relates to a second election held at the same place in December, 1835, for members of Ayuntamiento to succeed."

To the cross interrogatories put by the counsel of the City, he answered—to the first. "The primary election was on the first Sunday of December, 1834. The secondary, on the third, and the Ayuntamiento was installed on the 1st of January, 1835." To the second. "The Ayuntamiento was installed by the Commandante. He administered the oath to the Alcalde, and he to the balance. M. G. Vallejo was Commandante." To the third. "The election of 1836, for 1837, was held at the Presidio." To the fourth. "The Ayuntamiento of 1837 held its sessions at the Presidio until about the close of 1837, or beginning of 1838, when they removed to the Mission." To the fifth. "The Ayuntamiento removed to the Mission, the Governor having made it the Capital of the District; and because the Pueblo being a military post, a Pueblo could not be established there." Question sixth. "Look at Document No. 6, attached to Vallejo's deposition, and say what locality is referred to in that address?" *Answer.* "At that time the Alcalde, to whom it is addressed, was at the Presidio. José Castro well knew where the place is. Don Francisco de Haro was Alcalde at 'San Francisco de Asis' in October, 1835. He was Alcalde and presided over the meeting of the Ayuntamiento in 1835. There was no Ayuntamiento at the Mission in 1834 or 1835. The Ayuntamiento held its sessions at the Mission in 1838, and in 1839 it ceased, and the Governor appointed a Justice of the Peace."

18. William A. Richardson, on the 1st of June 1836, petitioned the " Most illustrious Ayuntamento, for the grant of a hundred Vara lot in Yerba Buena, in front of the Plaza, and the anchorage? of the ships" in which he represents himself as a " citizen and resident of this Port," resolved to establish himself in Yerba Buena, dated at " San Francisco." Richardson's 1st deposition. The paper purporting to be a map, marked exhibit No. 2, with the initials A. F., is the original plan; a copy of it was sent to the political Government, by order of the same Alcalde de Haro. I recommended the situation of the limits for the settlement or town of Yerba Buena, to General Figuearoa"—" There was no other plan adopted by the authorities, but the one here presented marked exhibit No. 2."

19. Document B. session of the Territorial deputation October 31st, 1834, " declaring the just reason which exists for effecting the formation of an Ayuntamiento in the " Port" of San Francisco. Referred to the Committee on Government."

20. Session extraordinary of the 3rd November 1834,—" it then passed to the discussion of the report which the same Committe presented, referring to the formation of an Ayuntamiento in " San Francisco." It was put to vote and passed in general. " The Senor political chief should see that the partido of San Francisco, proceed to the election of a Constitutional Ayuntamiento, which shall reside in the Presidio of that name" &c.

21. Document C, petition of the inhabitants of the Ranchos North of San Antonio and San Pablo, to be joined to the jurisdiction of San José, dated 30th of May 1835. This petition was referred to a Committee of the Territorial deputation, which, on the 3rd of September 1835, reported—"1st. That this dispatch be transmitted to the Ayuntamiento of the Pueblo of San José and "San Francisco" in order that they may give the proper information with regard to the desires expressed in it." "2. The information having been obtained, that this dispatch be remitted to this deputation for its final judgment. The excellent deputation approved the two propositions with which the foregoing report of the Committee on Government concludes."

And "Don José Castro" &c. on the 28th of September 1835, decreed that the above dispatch be forwarded to Ayuntamiento of the "Pueblo" of San José Guadalupe" &c. and that a true copy be sent with a similar object to that of San Francisco, accompanied with a list of the residents of the neighborhood of that "Pueblo."

22. On the 16th of January 1840, Francisco Guerrero J. P. reciting that he did so by order of the departmental Government dated the 1st of November 1834, granted to Juan Vioget, a lot 100 by 50 varas in "Yurba Buena" in the place called the "Canutal" to the west of the road to the Mission of San Francisco, being vacant land."

This evidence beyond all question establishes the fact of the existence of a Pueblo where the city of San Francisco now stands, having its commencement in the year 1834. Both, in the parol and written evidence it has been variously denominated. Sometimes by that of the "Pueblo of San Francisco;" "the port of San Francisco"—"the Pueblo of the port of San Francisco"—"the Pueblo of Yerba Buena"—"the Pueblo of San Francisco de Asis" and others by that of the "Pueblo of the Mission of San Francisco dolores." This diversity, so far from questioning, maintains the position assumed, that, there was a pueblo within the present limits of the city. And that it was in the place of the port is fully demonstrated, as it is clearly shown not to have been carved out of the Mission land of the Mission of San Francisco dolores, which, never extended to the "port;" and was in existence and lots granted in 1835, some three years before the Ayuntamiento ever held a session at the Mission.

II. That pueblo was in active existence on the 7th of July 1846.

PROOFS.

1. Vallejo—"there was a town on the present site of San Francisco, on the 7th of July 1846; and there was on the 3rd of March 1851 a town on that site, called San Francisco."

2. Richardson. "There might have been sixty or seventy inhabitants altogether in the city in July 1846,"—"Don Francisco

de Haro, was Alcalde of the Ayuntamiento in 1835. Joaquin Estudillo in 1836, and Gratio Martinez in 1837. De Haro, I think, in 1838; I don't recollect who in 1839; the names of the Alcaldes between 1839 and 1846, are DeHaro, Pendillo, William Hinckley, Francisco Sanches, José Jesus Nae, José de la Cruz Sanches." See 1st. deposition.

III. Municipal lands were assigned to the Pueblo in 1834.

PROOFS.

1. Vallejo.—"In 1834, I received a paper from Governor Figueroa, designating the boundaries of the Pueblo de San Francisco. I have examined document marked exhibit No. 4, and to the best of my recollection, it is a copy of the document received by me as above stated." "I don't know where the original of the document is, if it is in existance, I put it among the Archives of the Pueblo, as I did other documents of that character."

This document No. 4, which Vallejo says is a copy of the original received by him from Figueroa, designates the boundaries of the Pueblo, as given in his letter of the 24th of October, 1834, and the "I (he) proceeded to mark out the boundaries, and sent down to Monterey an expediente thereof; and they were established by me two weeks after the date of the said dispatch No. 4." "I have such a *recollection* of the boundaries established by me, that I could point them out on the ground."

2. Julius K. Rose, who speaks from the mouth of Guerrero, Alcalde says—in substance, that in 1849 he gave him the boundaries of the Pueblo as given by Vallejo. See his deposition.

3. Henry L. Ford, who came here in 1842 says—that in March 1844, Hinckley, Alcalde, stated to him the boundaries of the Pueblo in substance as given by Vallejo. And that Guerrero informed him that the land on this side of Mission Creek pertained to the Pueblo pointing out the boundaries between it and the Mission, &c. See his deposition.

4. Richardson in his second deposition says—question 2nd by the Law Agent. "What was reported to be the boundaries on the side toward the port of San Francisco of the old Mission, and the so called Pueblo of San Francisco Asis?"

Answer—"Mission Creek was the reputed boundary."

Question 3rd—" Was the place called Yerba Buena or the peat formed in it for the concession of holders ever considered as embraced in the actual limits of said Mission, or Pueblo of San Francisco de Asis ?"

Answer—" No ; it was not."

Cross interrogatories by the Counsel of the City.

1. " What were the old limits of the Mission of San Francisco de Asis ?

Answer—" I do not know what the limits were to the Southward and to the Eastward; but they never passed the Creek towards the port."

2. " Do you know what the Western boundary of the Mission was ?"

Answer—" The coast of the Pacific."

3. " Do the Mission buildings stand on the North or South side of Mission Creek ? and how far from it ?"

Answer—" On the South side and a little over a half mile from it."

4. " What was the Northern boundary of the Mission land West of the Mission buildings ?"

Answer—" It follows the Ravine of Mission Creek to a round hill called the *Divisedero.* There are two hills of that name. One where the Telegraph now is. The one furthest South is the one I mean, and from that to the Pacific coast."

5. " What was your means of knowledge that Mission Creek was the Northern boundary of the Mission ?"

Answer—" My means of knowledge were that, the lands on this side (North) was used for pasturing the Mission stock and frequent disputes arose out of it. I recollect when I first came there were Indian huts on the North side of the Ravine, on a line from the Mission North four or five hundred yards distant ; and I think at that time the stream ran by the huts."

6. " Was the place where those huts were known by any particular name ?"

Answer—" It was called a Rancheria."

8. " Do you know a place called " Canuatales" there, and if so is it to the North or South of the Northern line of the Mission lands as you have described the boundaries, and how far from it ?"

Answer—" I do know such a place. It is to the North of that line. All the little valleys to the North go by that name. They take the name from a species of reed growing in them with a black ring round them."

9. " Do you know the Spanish term by which Indians were known and designated at that time?" *Answer.* " The Christian Indians were called 'Neophytes' and the others 'Gentiles.'"

5. Francisco Guerrero, Justice of the Peace, by order of the Departmental Government, granted a lot to Juan Vioget, on the 16th of January, 1840, after he had completed his map, of 100 by 50 varas, in the place called the " Canuatal," to the West of the road to the Mission of San Francisco, being vacant land. This grant was made at San Francisco.

The boundaries thus indicated in the testimony of Richardson, as the Northern boundary of the Mission, is the boundary given by Vallejo to the Pueblo of San Francisco. The testimony of Rose and Ford corroborates and supports his; and the grant to Vioget, bounded by the " Canuatals " to the West of the Mission road," one of the calls in Vallejo's boundary leaves no doubt of the understanding of the boundary at the time, and that the land granted was in the recognized limits of the Pueblo. But Vallejo on his first examination said—" I did have in my possession a copy of the original document referred to as exhibit No. 4, certified by the Secretary, Zamerano. I think I have that copy among my private papers," &c. Upon his second examination he says—" I have the paper now in my possession referred to in my answer to question 12; and is now here by me produced to be attached to this deposition, No. 18. I am acquainted with the hand writing of the said Zamerano, having seen him write; and say that his signature in exhibit No. 18 is his genuine signature."

Question. " Has or not this document referred to, exhibit No. 18, been in your possession ever since about the period of its date?"

Answer. " I was in possession of it except at the Bear revolution, as it is called, in 1846. It, with my other papers, was taken from me and retained until after my own release. I think my papers were not returned to me until early in the year 1847, by Liet. Revere, of the U. S. Navy. I have no hesitation in saying that the paper, No. 18, is a true copy of the original, recorded by me and delivered to the Alcalde."

Question. "Does or not the paper, exhibit 18, contain a true statement of the boundaries of this Pueblo as marked out by you?"

Answer. "It does contain the boundaries as established by me."

The Government has attempted to show by the negative testimony of Hartnell, Alvarado, Castro and Richardson, that document, No. 18, is spurious.

Question to W. E. P. Hartnell. "Examine the paper marked, &c., No. 18, attached to the deposition of M. G. Vallejo, heretofore taken in this case, and say, if you recognize the hand writing in which the body of the paper is written?"

Answer. "I do not. I think the signature of Zamerano affixed to the paper, a very suspicious one at least; and I do not believe it to be in his hand writing."

Alvarado. "I have seen the document marked, &c., No. 18, purporting to be a copy of a dispatch from José Figueroa to Don Maréano G. Vallejo, Military Commandant of San Francisco. Consider the words 'escopia conforme' and the signature, Zamerano, and cannot justify the words nor the signature, because I do not find it exactly as he used to write it. I am not acquainted with the hand writing of the body of the letter."

José Castro. "I was well acquainted with Zamerano, former Secretary of Governor Figueroa, and very familiar with his hand writing, &c. The signature, Zamerano, to the document, H. J. T., No. 18, annexed to the deposition of M. G. Vallejo, filed in this case, is not genuine; the rubric is more imperfect than the name; according to my judgment it is not his. The words 'escopia conforme,' written on the same paper above his name, is not his hand writing. I do not know the hand writing of the body of said document. I can say that Governor Figuerao never had a clerk in his office. *According to the best of my judgment, he wrote a hand writing such as this.*"

Thus it seems that neither Hartnell, Alvarado or Castro speak with certainty in relation to the verity of this document, while

Castro says that, "according to the best of my judgment, he (Figueroa,) wrote a hand writing such as this," the body of document 18.

But Richardson, after declaring his acquaintance with the hand writing of Zamerano, says: "The signature at the bottom of the last mentioned paper, (document 18) is not the signature of Zamerano; the words "escopia conforme," immediately preceding the signature are not in his hand writing. I never heard of a town called San Francisco being laid off, as represented in this document, nor of a grant to a town of that name. I have heard of a grant of land to a town or pueblo called Yerba Buena."

This witness is unworthy of credit.

1st. He says—"In the early part of the month of October, 1835, I received a one hundred vara lot in Yerba Buena, situated in what is now Dupont street, on the South-west side of that street, on the North side of the Adelphia Theatre," &c. "I received by the order of the Territorial Deputation to the Alcalde of the Mission of San Francisco de Asis, in 1835, in the month of October, the *Alcalde* of the Mission of *San Francisco de Asis*, Don Francisco de Haro received orders from the Political Government to lay off a small town at the place Yerba Buena," &c., "as the place called Yerba Buena was the general anchorage for the shipping at the time. The same orders directed me to assist de Haro in doing it, and the orders also directed de Haro to give me a hundred vara lot," &c., "and to make a plan of the place selected and measured off for the town. It was laid off as represented by the plan or map, marked exhibit No. 2," &c. "A copy of this plan was delivered to the magistrate, de Haro; he requested me to keep the original in my possession. The limits established by the magistrate were as follows:—they first measured off two hundred varas from the beach," &c. "Then they measured off a certain distance to a place intended for a street, which they called 'Calle de La Fondacion.' I think this was two hundred varas from the Reserve. From this street they then measured off three hundred varas more in the same direction to the South-west; then from the South-east they commenced on the first sand hill and measured in a North-west direction along the said 'Calle de La Fondacion,' four hundred varas; and there located my lot. It was the fifth one hundred vara lot," &c. "These boundaries of the Pueblo of Yerba Buena were approved by the Territorial Government."

Now, the grant made to Richardson, of a hundred vara lot, and the only one made to him, was made on the 2nd of June, 1836, by José Joaquin Estudillo, Alcade, and not by de Haro, as sworn by him; upon his petition of the 1st of June, 1836, in which he declares himself a resident of the "Port," resolved to establish himself in Yerba Buena and asks for a grant of a hundred vara lot in "front of the Plaza and anchorage of the ships," to build a house on. Not a word in reference to his plat, the "Calle de La Fondacion," the number of the lot desired, or that he was to have a lot for making his plan. And the grant was made in consideration of the "good services that the party requesting has rendered to this jurisdiction since his arrival in this country with his different trades, as brick-maker, surgeon and carpenter, and having married one of the first in the country. See copies of the originals and translations from the public records.

Without further showing, who can doubt but that this plan is an after thought, fabricated to serve as a peg upon which to hang the Limantour claim?

2 Juan Vioget says—that in the winter of 1839, he made a plan of the town by the request of Francisco Guerrero, Alcalde. Made it to throw the former grants which had been made in an irregular form, into blocks or squares. The West side of Montgomery street was made the base line or city front. He then drew Sacramento, Clay, Washington, Jackson and Pacific streets, as they are now known; and laid off at right angles, Kearny and Dupont streets. At the same time marked off Richardson's lot, but made no corresponding street. The The only instructions received from Guerrero were to regulate the grants then made, and to have a plan by which to make future ones. There were no limits stated to me. Did not make more streets. Did not think them necessary at the time, but dotted the extension of those made. Guerrero told me that Governor Alvarado had ordered the survey. At the time I

made my map I had no knowledge of any previous one. Never saw or heard of one. Richardson's family was living in his house in Dupont street. He was sailing about in the harbor all the time. Whether he knew or not of it, I can't say. He must have known shortly after. I was sometime doing the work. There was but few people here. They saw me at it and must have known what I was about.

Question 2. " When and from whom did you first hear of the map said to be made by Richardson?"

Answer. " I never knew any such map was in existence until José Y. Limantour spoke to me about it last year."

3. Richardson, in his first deposition says—" From July, 1835 to June, 1841, I resided at Yerba Buena. I never knew of an Ayuntamiento setting at the Presidio ; when I came here in 1835, they were sitting at the Mission ; they always sat at the Mission."

Francisco Sanches, another witness for the United States and an official of the Pueblo in several capacities from its first organization, says—that the Ayuntamiento held its sessions at the Presidio from its installation, 1st of January, 1835, to the latter part of the year 1837, or the beginning of 1838 ; and that " there was no Ayuntamiento at the Mission in 1834 or 1835."

These contradictions and discrepancies, with others not noted, but which are abundant, and apparent in the testimony, must destroy all confidence in that of Richardson. But, if it were otherwise, we hold upon principle that the affirmative of testimony of Vallejo as to the verity of document No. 18, supported as it is, cannot be shaken by the negative testimony of a host of witnesses as to hand writing.

But, suppose it were admitted that No. 18 is a spurious ducument as relates to the words " escopia conforme," and the signature of Zamerano ; yet, Vallejo swears that it is a copy of the original, under which he designated the boundaries of the Pueblo ; and which original he placed in the Pueblo archives. That original, after the most dilegent search, is not to be found. Its existence is proved, if Vallejo is to be believed ; and the best possible evidence of its contents is the documents 4 and 18.

POINTS OF LAW.

I. Ayuntamientos were alone accorded to cities and towns by the Spanish and Mexican Governments, and not to partidos, or other political divisions of Territory.

II. The ten league question does not arise in Pueblo claims for municipal lands.

1. They were not subject to colonization under the law of the 18th of August, 1824. § 2. And consequently, not to the prohibition in the 4th section.

2. The Presidios in California were all established prior to the colonization law of 1824; were all established as well as the Missions, which they were intended to support within ten leagues of the coast; and by the existing law, Presido grants were authorized within the range of four square leagues, measuring from the centre of the Plaza. Decree of de Noroa, 22nd March, 1791. Rockwell, p. 451.

3. Mexico, on the 17th of August, 1833, passed an act for the secularization of the Missions and their reduction to Pueblos. The Territorial Deputation, enacted on the same subject, on the 6th of August, 1834. And the Governor, Figueroa, on the 9th of the same month, published his regulations converting the Missions into Pueblos; the heads of families to have grants of the Mission lands. Section 5 of his Regulations.

III. The formation of Pueblos were favored by the Spanish and Mexican Governments, both of which, always accorded to them municipal lands, for solaros, proprios, and Egedos. And this, whether established by Emprerarios, or direct action of the Government.

Lib.	III.	Title	III.	Law	28,	Rec'd	Ind. 2	White's	Rec. p.	41
Lib.	IV.	"	"	"	8	"	"	"	"	43
Lib.	"	"	"	"	28	"	"	"	"	43
Lib.	"	"	V	"	6	"	"	"	"	44
Lib.	"	"	"	"	7	"	"	"	"	44
Lib.	"	"	"	"	9	"	"	"	"	45
Lib.	"	"	"	"	10	"	"	"	"	45

Lib. IV. Title VII. Law 7, Rec'd Ind. 2 White's Rec. p. 46
Lib. " " " " 11 " " " " 47
Lib. " " " " 14 " " " " 47

And so sacred was this right held under the Spanish Government, that grants made of them by the King were declared void.

Lib. VII. Title 16, Law 1, Rec'd Ind. 2 White's Rec. p. 100
Lib. " " 16 " 2 " " " " 100
N. " 13 " 1 " " " " 55

United States *vs.* New Orleans, 10 Peters, 701.730.

Cohas *vs.* Lagree, and another Supreme Court, California.

The same principle is recognized in the Mexican Constitution, imposing restrictions upon the power of the President. " The President cannot occupy the property of any individual or corporation, nor disturb them in the possession or use of the same." 1 White's Rec. p. 402. § 4. Article 112.

Pueblos with an Ayuntamiento were corporations under both the Spanish and Mexican Governments.

Alvarado, in answer to the question—" By what authority, after the Mexican Independence, were municipal lands or Engidos assigned to towns ?" said—" I recollect a law given by the Cortez of Spain in 1813," &c. " This law provides the manner in which the municipal lands shall be assigned to towns already established, or which may hereafter be established. I do not recollect any decree of the Congress or President of Mexico recognizing those laws as in force in California, but I am certain the said Spanish law was ordered by the Mexican Government to be observed by all the Governors within the Territories of the Mexican Republic; and it was acted upon."

On the 6th of August, 1834, the Territorial Deputation enacted—" Section 1st. The Ayuntamientos shall make application, through the usual channels, requesting lands to be assigned to each Pueblo for Engidos and proprios."

Vallejo shows that he received an order from Fiqueroa, then Governor, dated the 4th of November, 1834, assigning boundaries to the Pueblo of San Francisco. That he established the boundaries as directed, within two weeks from the date of the order. That he deposited the original in the archives of the Pueblo. That documents No. 4 and 18, attached to his deposition are substantial, if not literal copies of it. And that his recollection of the boundaries are such as to enable him now to point them out on the ground.

And on the 26th of October 1835, José Castro, the acting Governor, in a communication to the Alcalde, Francisco De Haro, who then resided at the Presidio. Testimony of Sanches, made known to him that—"the Territorial deputation in its Session of the 22nd of September, approved that the Ayuntamiento of this Pueblo, have power to grant house lots, which should not exceed 100 varas." Document No. 6, Vallejo's deposition.

IV. The Municipal organization of Pueblo, was by the giving to them Ayuntamientos; and thus organized the right to Municipal lands resulted for solares, proprios and Egedos, Lib. iv. T. 6 L 7. 2 White's Rec. 45. Lib. iv. T. 17, L. 5, White Rec. 55. Lib. vii. T. 16, L. 1. 2. 2 White's Rec. 100.

The Ayuntamiento was organized and inducted into office at the Presidio on the 1st day of January 1835.

V. Formal grants of land were never made to Pueblo, either, by the Spanish or Mexican Governments. They were assigned, designated, bounded or laid off, so as to separate them from the balance of the domain. When established by an Emprerario his contract governed; when by the Government, the laws gave the right. Not as a grant of the fee, but as a dedication to the uses for which designed. 2 Green l, oc. §662; and cases cited, Chotoan vs Eeckhart 2 Howard 344, 372, MCay vs Dillon, 4 Howard 421. New Orleans vs United States, 10 Peter 662, 701, 730.

The cases in Howard are referred to, to show upon how much weaker testimony than in this case, the Pueblo rights were confirmed; and the case in Peters, to show that these rights were from dedication and not from grant.

VI. The act of Congress, March 3rd 1837 §121—"shall not extend to any town lot, farm lot, or pasture lot, held" &c. "nor to any city, or town, or village lot, which city, town or village, existed on the 7th day of July 1846," &c. "and the fact of the existence of the said city, town, or village on the said 7th July 1846, being duly proved, shall be prima facie evidence of a grant to such corporation," &c.

The word "Grant" used in this section must be interpreted "right." Any other would render the provision negatory. What right? A right to Municipal lands. To what extent? When assigned to the boundary designated, and when not to four square leagues.

Now: it cannot be questioned: 1st. But, that there was a town here on the 7th day of July 1846. 2d. But, that the present city of San Francisco, succeeded to the rights and incurred the responsibilities to which that town was subject, at the time of its incorporation, April 15th 1850, and not to the rights and responsibilities of the Mission of San Francisco de Asis. 3rd. But, that the presumption declared in said section was declared in favor of the city as the successor of the town. 4th. But, that, so far from the evidence in the case disproving the presumption declared, it favors it. If not according to the letter, and Grant, certainly, according to the spirit and intent of the Act. "Shall be prima facie evidence of a Grant;" prima facie evidence in its favor, of being entitled to the ordinary rights of a town to Municipal lands, solares, proprios and Egedos.

VIII. "And where any city, town, or village shall be in existence at the time of the passage of this Act, the claim for the land embraced within the limits of the same may be made by the corporate authorities of the said city, town, or village." This city was incorporated by act of the Legislature on the 15th of April 1850, with definate boundaries, and a clause resigning to her all rights which she might have exterior to them. The quotation at the head of this point is part of the sentence, Section 14 Act of Congress, March 1851, and the presumption declared in the previous part, must equally apply to it, or, if not, the claim of land spoken of in it, to be made by "any city, town, or village in existence at the time of its passage, must intend a confirmation within the corporate limits, as a donation, to such city, town, or village, so far as the United States is concerned, and that without limitation or condition.

ISAAC THOMAS,

Assistant Counsel for Claimant.

to do justice!

inability

CITY OF SAN FRANCISCO,
vs.
UNITED STATES.

No. 280.—*Before U. S. Land Commissioners.*

Argt commenced
at 20 minutes
begun / Note by
Crockett

The undersigned, on behalf of the claimant, respectfully submits the following reasons why the said claim ought to be confirmed:

Before adverting to the testimony, however, it may be well to premise, that the claim is for four square leagues, bounded on the north and east by the Bay of San Francisco, on the west by the ocean, and on the south by a due east and west line, including the area aforesaid. There is, therefore, no difficulty in ascertaining the precise land claimed.

The title of the city is predicated upon three grounds, to wit:

Submitted
on Argument

1. That for some years prior to the treaty of Guadalupe Hidalgo, there was at this place a Pueblo or town, called and known as "Yerba Buena," or "San Francisco," and which has since been duly incorporated as the City of San Francisco; and that as such Pueblo, it was entitled, under the Mexican and Spanish law, to four square leagues, as a part of its municipal rights, even though no express grant be shown.

No Com!
Submitted

2. That in November, 1834, the Pueblo was duly and formally established by a decree of the Governor and Departmental Legislature of California, and its lands expressly assigned to it, by metes and bounds, and by competent authority.

3. That on the 7th day of July, 1846, the town of Yerba Buena or San Francisco was in existence, and that by the fourteenth section of the act of Congress of March 3d, 1851, organizing this Board, a grant will be presumed, until the contrary appears; and in this case, nothing has been shown to repel this presumption.

I propose to discuss these propositions in the order in which they are stated; but before proceeding to do so in detail, would invite the attention of the Board to the general nature of the village right to common and other lands, under the laws and usages of the Spanish and Mexican Governments, as recognized not only in the legislation of Congress, and in numerous decisions of the Supreme Court of the United States and other courts of high authority, but also as established both by the positive enactments and long continued usage of the Mexican and Spanish Governments.

The treaty of 1803, by which Louisiana was ceded to the United States, afforded the first occasion on which Congress was called upon to legislate concerning this village right. For many years prior to that period, Louisiana had been a Spanish province, and even then was sparsely populated; and the inhabitants of which resided chiefly in villages, cultivating the contiguous lands for their support, and invariably having common lands, for pasturage and fuel, conveniently located near the village. In this condition, Congress found the country at the date of the cession, and at once organized a Commission, for the adjudication of private claims, on the most liberal and equitable basis. But it was soon ascertained that, owing to the primitive habits of the people, and the very loose manner in which lands had been granted and conveyed, great hardship would ensue, if the inhabitants of the villages were compelled to establish even informal grants to the town lots on which they had been born, and the common lands over which their cattle had roamed for many years. Therefore, on the 13th of June, 1812, Congress, in a commendable spirit of liberality, passed a law, the first section of which enacts "that the rights, titles and claims, to town or village lots, out lots, common field lots, and commons, in, adjoining and belonging to the several towns or villages of Portage des Sioux, Saint Charles, Saint Louis, Saint Ferdinand, Village a Robert, Carondelet, Saint Genevieve, New Madrid, New Bourbon, Little Prairie and Arkansas, in the territory of Missouri, which lots have been inhabited, cultivated, or possessed, prior to the 20th day of December, 1803, shall be, and the same are hereby confirmed to the inhabitants of the respective towns or villages aforesaid, according to their several right or rights in common thereto." [2 *Statutes at Large*, 748.] This has been repeatedly construed by the courts to be a legislative grant or confirmation, as effective as a patent to convey whatever title was in the Government of the United States. It will be observed that this act requires no proof of a prior grant, nor any other evidence of title except that which results from *occupation*, *cultivation*, or *possession*, prior to the 20th day of December, 1803—the date of the treaty of cession. In a spirit of liberal forbearance towards the ignorant and peaceful villagers, who claimed these lots, Congress demanded of them no other proof of title than that derived from their prior occupancy. It will be observsd, also, that the act embraces not only "town lots, out lots, and common-field lots," but "*commons*" also—thereby distinctly recognizing a "common" as appurtenant to each of these villages. In 1831, when these villages had (some of them) grown into cities, and particularly Saint Louis, Congress, in order still further to perfect the title in the inhabitants, in a convenient, practical form, released, in the most explicit manner, to the corporate authorities, whatever title the United States held to the commons. In virtue of these two acts, the City of Saint Louis obtained, as her common lands, over 6,000 acres, whilst the village of Saint Charles obtained over 14,000, and Carondelet, a small French village, only six miles distant from Saint Louis, over 12,000 acres. I cite these facts to prove, first, that Congress distinctly admits the existence of a "common," as appurtenant to a Spanish village; and second, the very liberal spirit evinced by the Government towards these village claims.

In the case of Chouteau *vs.* Eckert, (2 Howard, 344,) the controversy related to a lot in the commons of Saint Charles; and Justice Catron, in delivering the opinion of the Court, says:

"The character and nature of the village right in this country is somewhat peculiar. The inhabitants of upper Louisiana resided in villages almost exclusively, and cultivated common fields enclosed by only one fence; each person who cultivated the soil having assigned to him by the syndics of the town, a certain portion of land to cultivate. In this manner the chief tillage of the soil was carried on; the other parts of the country being in the forest state. The villages also required commons for pasturage for their horned cattle and horses, and for fuel and timber, this part not being enclosed. The quantity included in the field, for pasturage, timber and wood, was regulated by the nature of the soil and timber, and accommodated to the wants of the inhabitants, and conceded at the discretion of the Government—usually to a very liberal amount. As the principal support of the population was derived from agriculture and pasturage, the village commons were deemed of primary importance by the people and Government, and as a common title, more favored than individual titles in cases of conflict. In this situation, the United States found the country, when they came into possession of it, in March, 1804, as the successor of France, or rather Spain, in virtue of the treaty of cession. So great has been the change by the introduction of a population with different habits and modes of agriculture, that it is difficult to estimate at this day the former importance of the village common to the French inhabitants. It was the basis on which their society was formed, to such an extent, that the early acts of Congress could not be well understood without a reference to this important circumstance; and especially not the sweeping act of 1812."

These remarks of the learned Judge are entitled to especial consideration, as applied to the villages of California, which, far more than the villages of Louisiana, required commons for pasturage for their cattle and horses, and for fuel and timber. It is emphatically true of them that the "principal support of the population was derived from agriculture and pasturage," and that "the village commons were deemed of primary importance by the people and Government, and as a common title, more favored than individual titles in cases of conflict." That Congress was deeply impressed with the truth of these views, and regarded with especial favor the claim for village lots and commons, is evident from the fact that in 1812, without any previous confirmation by a Board of Commissioners, and without any evidence of an express grant, but exclusively on the ground of prior possession, and the practice and usages of the French and Spanish Governments, Congress confirmed to the inhabitants not only their town lots, but their common lands, in the utmost extent to which they had ever been claimed as such. The nature of these village claims, and the very imperfect evidence of any express grant, will appear from the case above cited, (Chouteau *vs.* Eckert, 2 *How.* 344,) and Mackey *vs.* Dillon, (4 *How.* 421.)

But in the leading case of Strother *vs.* Lucas, [12 Peters, 440–1,] the rules and regulations of the Spanish government, concerning the founding of towns and villages, and the allotment of the common lands to them, are collated at great length; and from the authorities there cited, it is evident beyond dispute, that commons were not only deemed indispensable, but were regarded as so inviolable that even the king himself could not despoil his towns and cities of them. For further particulars of the Spanish law on the same subject, see 1 White's Recopilacion, 74 et seq.; New Orleans *vs.* United States, 10 Peters, 662; Bird *vs.* Montgomery, 6 Missouri R. 610.

In the latter case, the Court says, "It seems to have been the custom with the kings of France and Spain, to grant to towns and villages a portion of land contiguous thereto, as a common, for the supply of fuel to the commoners and to furnish pasturage for their cattle; and *the king himself could not alienate* such common. A careful examination of the laws and usages of both these countries, led the Supreme Court of the United States to the conclusion that these sovereigns could exercise a certain jurisdiction over these commons and other places similarly situated; but it was purely a police regulation. . . . . . Indeed, what kind of proprietory interest can we imagine existing in the crown, which is inalienable? The very terms of an absolute dominion imply the power of alienation. The dominion retained by the king of Spain, then, was not proprietary, but purely political—a dominion never severed from the sovereignty of any country, and nowise inconsistent with the absolute ownership of a subject."

The Court then proceeds to say, "It is needless, however, to enter into any minute inquiry in relation to the exact nature of the ownership of the commoners under the Spanish government. Whether corporeal or incorporeal, it was absolute and allodial, and no fee, according to the feudal understanding of that term, was outstanding in the king or any one else."

But the rights which towns and cities, under the Spanish law, acquired in their common lands, was more fully and perhaps more satisfactorily discussed in the leading case of the city of New Orleans *vs.* United States, [10 Peters, 662,] than in any other case decided by the Supreme Court of the United States. The controversy in that case was concerning the quay at New Orleans, and the proof established that whilst Louisiana belonged to France, a charter was granted to a corporation styled the "Western Company," by which the company was authorized to grant lands allodially in Louisiana; and under its authority, the ground on which New Orleans stands was selected as the site for a town, which was accordingly laid out, and a map thereof made, on which the space along the river in front of the town was designated as a "quay." After the building of the town had been commenced, the Western Company surrendered its charter to the crown of France; and it was claimed on behalf of the United States, that upon the cession of Louisiana, this government succeeded to all the rights which appertained to France; and that inasmuch as France, prior to the cession, had not granted

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the ground designated as the "quay," the United States as the successor of France, became vested with the fee. The Court says, "it is admitted that the power of the sovereign over the streets of a city is limited. He cannot aliene them, nor deprive the inhabitants of their use; because, such use is essential to their enjoyment of urban property; and a distinction is drawn in this respect between the streets of a city and other grounds dedicated to public use. The latter, it is contended, is not only under the supervision of the king as to its use, but he may sell and convey it. Now it would seem in reason that the principle is the same in both cases. The inhabitants of a town cannot be deprived of their streets, as the streets are essential to the enjoyment of their property. In other words, by closing the streets, the value of the buildings would be greatly reduced, if not entirely destroyed; and if ground dedicated to public use, which adds to the beauty, the wealth, the convenience and the value of town property, be arbitrarily appropriated by the sovereign to other purposes, is not the value of the property which has been bought and sold in reference to it, greatly impaired? But it is said, if the dedication was made by the king, the citizens of New Orleans or the public did not acquire a right paramount to this, and that having a right to regulate the use and the fee never having been conveyed by him to the city by grant or otherwise, he must of course retain the power of disposing of the property.—The right of the King to this property is compared to the right of a City, which is vested with the fee and the use, and as in such cases the corporation may dispose of the property dedicated, with the sanction of the sovereign power, the sovereign it is contended having the right of property, and the power to regulate the use, may alien. * * * * Though certain places may be dedicated to public purposes by the Supreme Power, and may be said to be withdrawn from commerce, still it is insisted, when no grant has been made and private rights have not become vested in the property, it is not withdrawn from the sovereign power. That the King under the law of nations, was entitled to the right of soil in Louisiana, is not contested: * * * but the conclusion which is drawn from this, that, as no grant was given, the King had a right, to alien the ground in contest, the same as any other part of Louisiana, is not admitted. * * * * * Does not this long acquiescence of the monarch, and enjoyment of the property by the city, afford some evidence of right? * * * *The public use of this common for so great a number of years, and the general recognition of it from the time it was dedicated, in numerous private and official transactions, and the acquiescence of the French King, offered no unsatisfactory evidence of right. If a grant from* the King were necessary to confirm the claim of the city, might it not be presumed under such circumstances?

The Court then proceeds to enquire, whether the transfer of Louisiana from France to Spain prior to its cession to the United States, in any manner impaired the rights of the city to its common property. After quoting copious extracts from the Spanish laws and ordinances, as contained in the Partidas and other works of high authority, the Court proceeds as follows:

"A faithful observance of these laws would have preserved the rights of the city, as to the common, free from invasion. No law was cited in the argument which showed the power of the King of Spain to alienate land which had been dedicated to the public use; and it is clear that the exercise of such a power would have violated the public law which is understood to have limited the exercise of the sovereign power in this respect."

The Court sums up its conclusions on this branch of the subject with the following emphatic language:

"From a careful examination of the jurisdiction exercised over this common by the governments of France and Spain, and the laws which regulated this description of property in both countries, the conclusion seems not to be authorized, that it was considered as a part of the public domain or common land which the King could sell or convey. This power was not exercised by the King of France, and the exercise of the power by the Spanish governor in the instances stated, was in violation of the laws of Spain, and equally against its usages. The land having been dedicated to public use, was withdrawn from commerce; and so long as it continued to be thus used, could not become the property of any individual. So careful was the King of Spain to guard against the alienation of property which had been dedicated to public use, that in a law cited, all such conveyances are declared to be void."

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But it was argued, that even though the Kings of Spain and France could not alienate the land, yet they retained the power to regulate its use, and that on the cession of Louisiana, the United States succeeded to this right and might therefore interpose to prevent the city of New Orleans from selling the property to private individuals in derogation of the public easement. But the Court decides that under the Constitution of the United States, the Federal government cannot hold or exercise such a power, and that if it exists anywhere, it rests with the State government to enforce the trust, and prevent what they shall deem a violation of it by the city authorities.

I have made these copious extracts from the learned opinion of the court, because they cast much light upon the rights of the claimant in this cause. In my judgment this decision conclusively establishes the following propositions, to wit: 1st, that in favor of long usage and in the absence of an express grant, the law will presume a grant; 2d, that under the Spanish law, land once dedicated to public use, cannot be alienated even by the king; 3d, that in relation to common lands, either expressly or by implication, dedicated to public use, before the cession of foreign territory, the United States, as the successor of the former sovereign, acquires no title either in fee or otherwise to such common lands; 4th, that in respect to such commons the Federal government cannot interpose to prevent a sale thereof, or a breach of the trust by which they were dedicated; that subject being exclusively within the jurisdiction of the state authorities.

[illegible]

I think the conclusion is irresistible, from these authorities, that it was not only a custom and usage, but a positive enactment of the Spanish government, that in the founding of towns and infant settlements in the provinces, not only town lots were to be assigned to the inhabitants, but commons for pasturage and fuel, the title to which was vested in the inhabitants for public use, and which the king himself could not alienate.

I propose in the next place to enquire, whether these regulations were applicable in a peculiar degree to California, so long as it remained a Spanish province. It is a matter of history, that at least as early as the year 1777, an effort was being made by the Crown of Spain, to civilize and christianize the Indians of California by the establishment of "missions" in their midst. For the protection of these missions, presidios or military posts were established, and very soon afterwards it was deemed necessary to encourage colonization by the establishment of pueblos or villages with extraordinary privileges. Indeed, it is evident from the history of the times, that settlements could not then safely be made, except in towns or villages; and hence the government earnestly endeavoured to promote that form of settlement. Hence we find that the *first* express authority for granting lands in California related to "commons" for the use of the inhabitants of pueblos and villages. As early as the 17th August, 1773, the viceroy in his instructions to the commandante of this province, Art. 12, says: "with the desire to establish population more speedily, I for the present grant the commandante power to designate common lands, and also even to make individual concessions to such Indians as may most dedicate themselves to agriculture and the raising of cattle; for having property of their own, the love of it will cause them to plant themselves more firmly; but the commandante must bear it in mind, that it is very advisable not to allow them to live dispersed, each on the land given him; *but that they must have their house and habitation in the town or mission where they have been gathered or settled.*" From this, it was evidently the intention of the government, to commence the settlement of the country by the establishment of towns or villages. In furtherance of this policy, the commandante was first to designate common lands for the use of the people. This was to be the chief mode of granting; but in meritorious cases he might grant lands to individuals on condition they would reside in the villages.

Art. 6 enjoins upon the Commandante the importance of congregating the Indians in the Mission Pueblos, "in order that they may be civilized and led to a rational life."

Arts. 7 and 8 contain directions as to the proper sites for new settlements, in relation to water, timber, &c., and the instruction of the Indians in the arts of building, &c.

Art. 9 recites that all new settlements beginning with few families, may afterwards grow into large cities.

Art. 10 provides, that as the mission settlements are hereafter to become cities, care should be taken that the houses be built in line, with wide streets and good market squares, &c.

Art. 11 provides that for the preservation of the new mission settlements, it is very essential that near them should be encouraged the raising of cattle, cultivation, and the planting of trees.

These instructions may be found at large, appended to the Reports of

Capt. Halleck and William Carey Jones, and taken together, they evince most clearly that it was the policy of the government to commence the settlement of the country with towns and villages.

It was also found necessary to establish in California depots of provisions for supplying Spanish vessels from the East Indies, and for the support of the Presidios; and to that end instructions were sent by the viceroy, in June, 1777, to Don Philip Neve, the then Governor of California, to establish two Pueblos; one on the Rio Guadalupe, and the other on the Rio Porcinculo; and to allot lands to the "pobladores," or colonists. Having established the Pueblos in pursuance of his instructions, the Governor, on the 1st of June, 1779, established certain regulations for the government of the Californias, which direct with much minuteness how the affairs of the Pueblos are to be conducted, and define with great precision the rights not only of the inhabitants, but of the Pueblos in their municipal character.

Article 1st recites that the Pueblo of San Jose had been established especially to encourage agriculture and the breeding of cattle, so that it might furnish supplies for the Presidios, &c.

Article 2nd secures a liberal pay or bounty to the "pobladores," or settlers in the Pueblo.

Article 3rd allots to them certain cattle and farming implements; some for the use of the settlers severally, and the remainder to be used by all in common.

Article 4th provides for the allotment of house lots to the inhabitants, to be designated by the Government; *and also of common lands, pasture grounds, and sowing lands*, to be designated and set apart for the *Pueblo, for municipal purposes.*

Article 5th defines the size and number of the lots to be assigned to the inhabitants in severalty, and then provides that "of the Royal lands, as much as may be considered necessary, *shall be separated for the purposes of the Pueblo.*"

Article 8th provides that the colonists shall enjoy, for the maintenance of their cattle, the common use of the water and pasturage, fire-wood and timber, of the commons, forests and meadows, to be designated according to the laws to each new Pueblo; and besides, each one shall separately enjoy the pasturage of his own lands.

Article 9th, amongst other things, provides that a storehouse shall be erected, in which must be kept the produce of the "public sowing," which at the rate of one "almud" of maize per inhabitant, must be made, from the third to the fifth year inclusive, *in the lands designated for municipal purposes.*

For further particulars concerning these regulations, see the reports of Halleck & Jones. These regulations were fully approved by a Royal order of the 14th of October, 1781.

I submit, therefore, that these documents establish conclusively the early policy of the Spanish Government, for the encouragement of Pueblos or towns in California; and the further fact, that in founding such towns, the "commons," in the language of Justice Catron, in Chouteau *vs.* Eckhart, "were deemed of primary importance by the people and Government," and were in fact "the basis of their society."

But it will perhaps be said in reply, that even though all this were conceded to the fullest extent claimed, it would prove nothing as to the establishment or rights of a Pueblo under *Mexican* law, in 1834, or at a later period. In answer to this argument, I maintain—

1. That the laws, customs and usages of Spain, which were in force when Mexico renounced her allegiance to the Spanish Crown, continued in force in Mexico after that event, unless they were abrogated by some enactment of the new Republic. This principle is too well known to need illustration, or the citation of authorities. If Mexico, by her legislation, has in any respect changed, or modified, either the policy or plans of Spain, for the founding of Pueblos in California, it will be for the counsel for the Government to establish the fact; which I apprehend they will be unable to do.

2. Nothing short of an explicit act of the Mexican nation to that effect, would justify the conclusion that, in the founding of towns in her frontier provinces, she intended to abandon a policy, not only wise in itself, but so firmly established by long usage, and so congenial to the habits of her people.

3. The legislation of Mexico, since her independence, so far from indicating any change of policy in this respect, conclusively establishes a strict adherence to it. The first act of Mexico touching the disposition of her public domain, was the colonization law of 1824, the second article of which is as follows: "Those lands of the nation, which, not being private property, *nor belonging to any corporation or town*, may be colonized."

Argument
on this

In the regulations of 1828, for carrying into effect the law of 1824, the 13th article provides that "the union of many families into one town shall follow, in its formation, interior government and policy, the rules established by the existing laws of the other towns—special care being taken that the new ones shall be built with all possible regularity."

From these provisions, it is evident that the colonization laws contemplated the founding of *new* towns, with the same rights and privileges which appertained to other towns of the Republic.

By an act of the Mexican Congress of the 17th of August, 1833, the Missions of the Californias were ordered to be secularized; and in order to carry this law into effect, the Territorial Deputation of California, on the 6th of August, 1834, decreed as follows:

"1. The Ayuntamientos shall make application through the usual channels, requesting lands to be assigned to each *Pueblo*, for *egidos* and *propios*."

"2. The lands assigned to each Pueblo for *propios* shall be subdivided in to middling-sized and small portions, and may be rented out or sold at public auction, subject to an emphyteutic rent or tax; the present possessors of lands belonging to the *propios*, will pay an annual tax, to be imposed by the Ayuntamientos—the opinion of three intelligent and honest men being first taken."

The third article prescribes the prices for building lots.

Three days after the date of this decree, to wit, on the 9th of August, 1834, Jose Figueroa, the Governor of California, issued certain regulations to be observed in the secularization of the Missions, the first article of which is as follows:

"The Governor, agreeably with the spirit of the law of August 17th, 1833, and with the instructions which he has received from the Supreme Government, will, with the co-operation of the Prelates of the Missions, partially convert into Pueblos the Missions of this Territory; beginning with the next month of August, and commencing at first with ten Missions, and afterwards with the others."

The fifth article, amongst other things, provides that "*common lands shall be assigned to each Pueblo, and when convenint municipal lands also.*"

The fourteenth article is as follows: "The political government of the Pueblos ahall be organized in perfect conformity with the existing laws. The Government will give the necessary instructions to have Ayuntamientos established, and elections made."

Article fifteenth provides that "the economical government of the Pueblos shall be under the charge of the Ayuntamientos; but as far as regards the administration of justice, in litigated matters, they will be subject to the primary judges of the nearest towns constitutionally established."

Article twenty-third establishes rules for the enforcement of these regulations, and amongst others, provides that rancherias situated at a distance from the Missions, and containing more than twenty-five families, may, if they choose, form a separate Pueblo; and those containing less than twenty-five families, form a district, to be attached to the nearest Pueblo."

From these documents it is evident, the Governor and Territorial Deputation felt fully authorized to establish new Pueblos at their discretion; and the Governor recites that in doing so he is acting in pursuance of instructions from the Supreme Government. It is further evident, that *egidos* and *propios*, or common and municipal lands, were to be assigned to the new Pueblos, in accordance with the ancient customs and usages of the country. On the 20th of March, 1837, the Mexican Congress made a new law for the internal government of the Departments, of which California was one; and by this act it is provided, that "the interior government of the Department shall be under the charge of the Governor, Departmental Legislature, Prefects and Sub-Prefects, Ayuntamientos, Alcaldes, and Justices of the Peace;" and provides also that the Governor shall be appointed by the President. The Governor was to appoint the Prefects, approve the appointment of Sub-Prefects and Justices of the Peace, and might remove any of them, at his discretion. The Departmental Legislature was authorized "to pass laws relative to taxes, public education, industry, trade, and municipal administration;" and amongst other things, might authorize the Ayuntamientos to alienate certain property belonging to the municipal funds. Amongst other duties imposed upon the Prefect, he was authorized, agreeably to the laws, to regulate the distribution of *common lands*, in the towns of his district. The act also defines the mode of appointing the Ayuntamientos, Alcaldes, and other inferior officers, and defines their duties. This law remained in force up to the date of the acquisition of California by the United States.

I submit, that these documents establish, in the most conclusive manner, not only that the ancient usages of the Spanish Government, touching the allotment of common lands to Pueblos, was not only not abrogated by Mexico, but has been ratified and adopted in every act of the general or local authorities, pertaining to the subject, up to the latest period when the Mexican law prevailed.

I propose next to inquire whether, in the absence of all proof establishing either a special grant of municipal lands, or the designation of them by metes and bounds, the law will fix the quantity; and if so, how the particular lands are to be set apart. The petition claims four square leagues, and the question is whether or not the law and evidence establish that claim.

As early as March, 1791, the Commandant General of the Internal Provinces of the West, in a letter of instructions to the Commandant of California, conveys the following explicit declarations on this subject: "In conformity with the opinion of this Commandancia General, I have determined, in a decree of this date, that notwithstanding the provision made in the eighty-first article of the ordinance for the establishment and instruction of *Intendants*, the Captains of Presidios are authorized to grant and distribute house lots and lands to the soldiers and citizens who may solicit them, to fix their residences on; and considering the extent of four common leagues, measured from the centre of the Presidio square, viz: two leagues in every direction, to be sufficient for the new Pueblos to be formed under the direction of said Presidios, I have likewise determined, in order to avoid doubts and disputes in future, that said Captains restrict themselves henceforward to the quantity of house lots and lands within the said four leagues, without exceeding in any manner said limits, leaving free and open the exclusive jurisdiction belonging to the managers of the Royal Hacienda, respecting the sale, composition and distribution of the remainder of the lands in the respective districts. And that this order may be punctually observed and carried into effect, you will circulate it to the Captains and Commandants of the Presidios of your province, informing me of having done so."

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The eighty-first article of the ordinance referred to in this letter of instruction, may be found in 2 White's *Recopilacion*, (page 71,) from which it appears that the Intendants were invested with authority to decide as to the proper mode of distributing lands, in the provinces within their respective districts. It has been frequently decided by the Supreme Court of the United States, that in reference to lands in Louisiana, whilst a province of Spain, the absolute power of granting lands, with complete titles, was vested in the Intendant General, by the Spanish Government; and the same powers were doubtless conferred upon the Intendants of other provinces, as sufficiently appears by the eighty-first article of the ordidance above quoted. The instruction to the Commandant of California is explicit, and as it came from competent authority, it appears to establish very conclusively that four leagues, measuring from the centre, was to be assigned to the new Pueblos, where no other limits were actually defined. There is nothing to justify the inference that Mexico, after its independence, ever changed, abolished, or modified this rule.

2. I proceed now to the second ground relied upon in support of the claimants' title, to wit, that in November, 1834, the Pueblo was duly established by competent authority, and its lands formally assigned to it by metes and bounds. This proposition involves two questions—the first, a question of fact, to wit, whether or not proceedings were had, and if so, what proceedings to establish the Pueblo and define its limits; and the second, a question of law, to-wit, whether or not such proceedings emanated from competent authority and were effectual for the ends contemplated.

In support of the first point, I consider it established very satisfactorily—

1. That the Territorial Deputation, on the 6th August, 1834, passed an act directing the ayuntamientos to apply through the proper channels for lands to be assigned to new pueblos for *egidos* and *propios*, directing the *propios* to be rented out at auction, and fixing the price of house lots for building.

2. That on the 9th of the same month, the Governor (Figueroa) issued his decree for secularizing the Missions and converting them into Pueblos; and in the fifth article, directs common and municipal lands to be assigned to them.

3. That on the 3d November, 1834, the Territorial Legislature approved and ratified the decree of the Governor, and on the same day instructed the Governor to cause the Partido of San Francisco to hold an election for an Ayuntamiento, "*who should reside in the Presidio*," and to be composed of one Alcalde, two Regidors, and one Syndico; and that the Ayuntamiento, when chosen, should, in the shortest time, "*mark out the limits of its municipality*," and reduce to its political jurisdiction the neighboring population.

4. That on the following day, to wit: Nov. 4th, 1834, the Governor enclosed a copy of this decree to M. G. Vallejo, the Commandant, and directed him to see to its fulfillment, and notifying him that after the organization of the Ayuntamiento, the Commandant will no longer exercise civil functions (leaving those to the Ayuntamiento), and will confine himself solely to his military duties.

5. That on the same day (Nov. 4th, 1834), the Governor addressed an official despatch to the Commandant, notifying him that with the consent of the Territorial Deputation, he had adopted, entire, the plan before them submitted by the Commandant with respect to the Pueblo of San Francisco; declaring its boundaries to be the same recommended by the Commandant, and which are specially set forth in the despatch; and declaring that Mission Creek shall form the boundary "between the Municipal jurisdiction of that Pueblo and the said Mission of Dolores;" also, ordering the Commandant to cause an Ayuntamiento to be elected, so that they might be installed by the 1st January, 1835, and to designate the particular house in which they should meet. A copy of this despatch is appended to the deposition of Vallejo; and as its authenticity is disputed, I shall remark upon that point hereafter.

6. That on the 7th December, 1834, an election for the Ayuntamiento was held *at the Presidio.* This was a primary election for electors who were to select the Ayuntamiento. A copy of the official paper, certifying the proceedings, is also filed in this cause. In the body of this paper, it is stated that the election is held "*in compliance with what is ordered by the Political Chief, on the 4th November of this year.*" The official account of the annual election by the electors of the Ayuntamiento is not produced, but Vallejo testifies that they were elected.

7. That annually thereafter an Ayuntamiento was regularly elected, and exercised jurisdiction over the newly organized Pueblo, embracing the present site of the City of San Francisco, up to the period of the conquest by the Americans. This is abundantly established by the documentary and oral evidence in the cause.

8. That within a few weeks after receiving the Governor's despatch of the 4th November, the Commandant actually went upon the ground with a number of citizens, marked out and designated the boundaries as specified in the despatch, and returned an *expediente* or official account thereof to the Governor at Monterey. All this is positively sworn to by Vallejo, as a matter distinctly within his recollection ; and he mentions the names of several persons now deceased whom he remembers to have accompanied him in thus marking out the limits of the Pueblo. These are facts about which Vallejo cannot have been *mistaken.* He has either willfully perjured himself, or the facts which he thus testified to, occurred as he relates them. His character for veracity stands wholly unimpeached, and in no material particular is his testimony contradicted.

9. That the existence of the Pueblo, has been recognized in numerous official documents from 1834 to 1846, emanating from the Territorial Legislature, the Governors, Alcaldes, and other high functionaries. For example, on 31st January, 1835, Governor Figueroa addressed a communication to "Senor Alcalde Conste. de San Francisco de Asis." On the 26th October, 1835, Jose Castro, then Governor ad interim, addressed a communication to the same Alcalde, informing him that on the 22d of the previous month, the Territorial Deputation had "approved that the Ayuntamiento of this Pueblo have power to grant house lots, which should not exceed one hundred varas. for the building of houses in *the place called Yerba Buena,* at a distance of two hundred varas back from the beach ; the grantees paying the fee which is fixed by law, *as pertaining to the propios,* and binding themselves to construct their buildings in accordance with the best police regulations. I repeat this to you in order that you may make it known to your neighbors of that Pueblo, that they may not come with their memorials to this Government for favors which the Ayuntamientos have power to grant." This important document establishes several undeniable facts, to wit : 1st, it admits distinctly the *existence* of the Pueblo, by designating it as such ; 2d, it recognizes "the place called Yerba Buena" as within the jurisdiction of the Ayuntamiento and as a part of the Pueblo ; 3d, it establishes that Yerba Buena, was embraced within the *propios* or municipal lands of the Pueblo.

The site of the present City of San Francisco, is the same formerly known as the Village of Yerba Buena, and consequently is within the limits of the Pueblo referred to by Governor Castro. The existence of the Pueblo is further established by the official statement of the primary selection of electors on the 3d December, 1837, and the subsequent election of the Alcalde and other officers of the Pueblo, on the 8th January, 1838; also, by the proclamation of Governor Alvarado of the 17th June, 1839, for the organization of the constitutional system established by the law of 30th November, 1836, in which proclamation the various Pueblos are specially named (and amongst them that of San Francisco), and are required to hold elections as prescribed by said law; also, by the proclamation of Governor Micheltorena of November 14th, 1843, in which the several Pueblos are required to hold elections in pursuance of the law of March 20th, 1837. The Pueblo of San Francisco is one of those named in the proclamation. On the 11th March, 1844, the same Governor (Micheltorena) addressed an official despatch to the "Alcalde de San Francisco," enclosing an extract from an order addressed to an officer at the Presidio, directing him to march with a file of soldiers to Yerba Buena, and there place himself under the direction of "*the Alcalde or 1st Justance of Yerba Buena*," for the purpose of suppressing a riot.

On the 15th January, 1846, Sanchez, a retiring Alcalde of the Pueblo, delivers to Noe, a Justice of the Peace, all the archives of the Pueblo from its foundation, in 1835, up to that date, with an inventory or index thereof. This document is dated at *Yerba Buena*, 15th January, 1846; and from the index it appears that the archives from 1829 to 1834 inclusive, were in charge of the "*Military* command;" but in the subsequent years, of the "*civil tribunal*," thus strongly corroborating Vallejo's testimony, as to the founding of the Pueblo in the latter part of 1834, or early in 1835; up to which period, the Military Commandant had exercised also civil powers, which ceased on the organization of the Ayuntamiento in January, 1835. The fact that the inventory is dated at *Yerba Buena* establishes, at least *prima facie*, that the archives of the Pueblo were kept at that place, and this is a strong, if not conclusive circumstance, to establish both the existence of the Pueblo and that Yerba Buena was within it.

10. It is established beyond the possibility of doubt, by the proof already adverted to, and the testimony of the witnesses, that a Pueblo was established and regularly organized, and that it was known as the Pueblo of San Francisco or Yerba Buena; and this Pueblo we claim, embraced the land marked out by Vallejo, by whatsoever name the Pueblo may have been called.

On the whole, I consider the proposition conclusively established, as to the founding of the Pueblo and marking out its limits.

I propose now briefly to consider what objections are likely to be urged by the Law Agent adversely to the conclusions I have deduced on this branch of the case, and as far as possible, to anticipate the argument on the other side.

1. It wlll be claimed that the document dated November 4th, 1834, purporting to be a dispatch from Gov. Figuerra, and certified by Zamorano,

secretary, is not an authentic document. It purports to be a copy from an original, and to be attested by Zamorano, the Governor's Secretary. The witnesses, Richardson, Alvarado, Hartwell and Castro, testify that they were well acquainted with Zamorano, and knew his hand-writing ; and in their opinion, neither the body or signature to this instrument is in his hand-writing. This, however, is but a matter of *opinion*, as to the hand-writing of a party, twenty years ago, about which they may have easily been mistaken. On the other hand, Vallejo, who had quite as good an opportunity to acquire a knowledge of the hand-writing, testifies in strong terms to its genuineness ; and he further deposes, that he has been in actual possession of this identical document ever since its date, with the exception of a short period during his captivity after the "Bear Revolution" of 1846, and with the exception, also, of about three months, during which his papers were in possession of Desaldo. He further testifies, that he has a distinct recollection of receiving from Figueroa, about that date, a dispatch similar in purport, and of which he believes this to be an accurate copy. The original he delivered to the Alcalde de Haro, and after performing the duties devolved upon him in the dispatch, he made an *expediente* of the whole transaction, which he sent to the Governor at Monterey. Is it possible that Vallejo could be *mistaken* in all this ? There is no room for such an inference ; and if the facts he deposes to never occurred, it simply presents a case of wilful false-swearing, of which there is not the slightest ground for suspicion. The absence of all motive to perjure himself, the numerous corroborating circumstances, all sustaining his testimony, and above all, the irreproachable and highly honorable character of the witness, all repel the presumption that he has in any respect varied from the truth. The fact that such a document existed, is established and fortified by the following strong chain of corroborating circumstances :

1. That on the 3rd of November, 1834, the Territorial Deputation, by its decree of that date, directed the Governor to do precisely what he purports to have done, and what Vallejo swears he did do, by his dispatch of the following day.

2. The certificate of the primary election held at the *Presidio*, on the 7th of December, 1834, distinctly and in terms refers to "the notice of the Political Chief on the 4th of November of this year," as the authority for holding the election.

3. An Ayuntamiento had jurisdiction only co-extensive with a Pueblo Its municipal authority did not extend beyond the limits of the Pueblo for which it was chosen. That an Ayuntamiento *was* organized, and that its sessions were to have been holden at the *Presidio*, I presume will not be contested by any one. Is not the inference irresistible, that in proceeding to organize the Ayuntamiento, the Governor, as the first step towards it, would cause to be defined the territorial limits of its jurisdiction? This he did in the dispatch of the 4th of November. A neglect to define the limits of the Pueblo, would be like organizing a town council under our system, for a city without limits, or a county court for a county without boundaries. There is inherent in the very nature of the corporation, a limit to its territorial juris-

tion; and as there could not be an Ayuntamiento without a Pueblo, so there could not be a Pueblo without boundaries, either expressly assigned to it, or fixed by some general law or custom. The first step, therefore, in establishing the Pueblo, was to fix its boundaries; and this the Governor did in his dispatch of the 4th of November; and by his other dispatch of the same date, he directed the Ayuntamiento to be organized—both being indispensable to the establishment of the Pueblo.

4. Captain Halleck testifies that amongst the archives, whilst at Monterey, he saw papers, (not now to be found,) being correspondence between the Governor, Military Commandant, and Alcaldes of the Presidio and Pueblo of Yerba Buena and San Francisco, (which names were used indifferently,) in which the municipal and common lands of the Pueblo were frequently mentioned; and he further deposes that amongst the archives at this place, in the Alcalde's office, he recollects to have seen a paper, (not now to be found,) and which was a letter from Governor Figueroa, subsequent in date to the 4th of November, 1834, in reference to the boundaries of the Pueblo, which were to be fixed by the military authority. He also found many other papers in the Alcalde's office relating to the boundaries, and which consisted of official letters, decrees, &c., all which are now missing, and cannot be found. This testimony strongly fortifies Vallejo's statement, and I think is conclusive evidence of its verity.

5. William A. Richardson, whose testimony is much relied upon by the Law Agent for the Government, deposes as follows: "I have heard of a grant of land to a town or Pueblo called Yerba Buena;" and Juan B. Alvarado, another witness for the Government, says, in reference to Yerba Buena, "At one time some portion of land was designated to this town, by the Political Chief; as regards the limits, I do not recollect of their ever having been fixed as a town." This, at all events, tends to show that *some* lands were assigned to the town of Yerba Buena, and to that extent fortifies Vallejo's statement.

6. The testimony of Julius K. Rose and Henry L. Ford establishes that Guerrero and Hinckley, two of the Alcaldes under the former Government, and who had for many years resided at this place or the Mission, and are now deceased, described the boundaries of the Pueblo lands precisely as they have been defined by Vallejo. One of them (Guerrero) produced a map or sketch of the Pueblo, and pointed out to witness the lines on the map, and afterwards went with him on the ground and pointed them out there.

All these facts tend conclusively to establish the authenticity of the dispatch of the 4th November, and to render it certain that whether the signature of Zamorano be genuine or not, it is, at all events, evident that such a document *did exist;* and whether the one in evidence be in fact an attested copy, or only a copy of a copy, is wholly immaterial, provided the Court is satisfied that the original existed.

2. On behalf of the Government, it will probably also be imsisted upon, as a fair inference from the proof, that if a Pueblo was established at all, it was a Pueblo formed out of the Mission lands, and in furtherance of the law

for the secularization of the Missions; and that Vallejo has confounded *that* Pueblo with the other, which he supposes to have been founded in 1834. Let us see how far the facts proved will support this inference. In the first place, it will be conceded, I presume, on all sides, that *a* Pueblo *was* founded in 1834, either wholly upon the Mission lands, or upon the lands claimed to be embraced within the Vallejo line, or upon the two jointly. No one can read the proof in this cause, and doubt for a moment that a Pueblo was eslished upon one or the other, or both these tracts. What proof is there in the cause, to show that the Pueblo was to be formed exclusively of the Mission lands? I insist there is none whatever. No witness has testified to such a fact, and not a document in evidence proves, or, in my judgment, tends to prove it. If such a Pueblo *was* established, no limits were ever assigned to it, no lands set apart for it, and no Ayuntamiento organized for its government. There was but *one* Ayuntamiento; and though this held its sessions sometimes at the Mission, and sometimes at the Presidio, yet it is undeniable that it was *first* organized at the *Presidio*. The *first* primary election for electors to choose the members of the Ayuntamiento, was held at the Presidio. The *first* meetings of the Ayuntamiento, after it was chosen, were held at the Presidio. Alvarado proves this, and Halleck testifies that amongst the archives at Monterey, he saw about a half dozen letters from the Alcalde of this Pueblo to the Governor, concerning the holding of the sessions of the Ayuntamiento at the Mission instead of the Presidio. The Governor at first refused to sanction the change, but subsequently assented to it. Motives of convenience doubtless prompted the change. The mass of the population resided at the Mission, and there were suitable buildings there for the transaction of business; whereas there were only a few soldiers and indifferent buildings at the Presidio. With so small a population and so little business to transact, it was not very material whether the Ayuntamiento met within the Pueblo at the Presidio, or at the Mission, a few hundred yards across the line; and therefore the Governor consented to a change in the place of meeting,—little dreaming, perhaps, that so trivial a circumstance within a few years would afford ground for an argument affecting the rights of a city of fifty thousand inhabitants, and property of almost incalculable value. There is another fact which tends conclusively to establish that the Mission was not embraced within the Pueblo, as established in 1834, to wit: that no lots were granted at or about the Mission, by the Alcalde, or under the authority of the Ayuntamiento, so far as the proof shows. This is a pregnant circumstance, and is scarcely reconcileable with the hypothesis that the Ayuntamiento considered the Mission lands as within its jurisdiction.

For the following reasons, therefore, I infer that the Pueblo was not established exclusively on the Mission lands, to wit: 1. Because no witness proves the fact, and no documentary evidence establishes it. 2. No limits, or common lands, were ever assigned to such a Pueblo. 3. The decree of the Territorial Deputation, of the 3rd of November, 1834, directs that the Ayuntamiento shall reside at the Presidio. 4. The first primary election, and the first meetings of the Ayuntamiento, were held at the Presidio. 5. The place of meeting could not be changed without the assent of the Governor. 6. No lots or lands were granted, under the authority of the Ayuntamiento, at or about the Mission.

I will now proceed to state why I infer that the Pueblo *was* founded within the limits described by Vallejo. 1. It is positively sworn to as a fact within his knowledge, by Vallejo, who is a credible and unimpeached witness· 2. It is proved by the dispatch from Governor Figueroa, of the 4th of November, 1834. 3. Vallejo swears that the Ayuntamiento had jurisdiction only within the limits of the Pueblo; and as the Ayuntamiento was organized at the Presidio, and held its first meetings there, and could hold them no where else without the consent of the Governor, the inference is irresistible that the Presidio was within the Pueblo. 4. The Alcalde granted lots at Yerba Buena, which he could not lawfully have done if it had not been within his jurisdiction. 5. No lots were granted by the Alcalde, outside of the Vallejo line. 7. Guerrero and Hinckley, two of the Alcaldes, now deceased, described the limits of the Pueblo precisely as they are defined by Vallejo.

8. A number of the witnesses speak of the "*Pueblo* of Yerba Buena," and it is so designated in many official documents. Richardson, a witness for the Government, in referring to the limits of the town as defined on his map, says: "these limits of the *Pueblo* of Yerba Buena were approved by the Territorial Government." Alvarado says: "the *Pueblo* of Yerba Buena was known by the people of the country by the name of Yerba Buena; but by persons who came by sea it was called the Port of San Francisco· Halleck says that in official documents, which he saw amongst the archives, it was termed indifferently "Pueblo of Yerba Buena" or of "San Francisco."

9. In the grant to the De Haros for the Protrero Nueva, lying just *south of Mission Creek,* the north line of that grant is made subject to the line of the pueblo, so as to avoid infringing on the pueblo lands. Jimeno, the secretary of the Governor who made the grant, stated to Halleck, that it was so made because the Governor did not know precisely where the south line of the Pueblo was; but Jimeno supposed it to be about Mission Creek. This is a distinct recognition of a Pueblo *north* of Mission Creek.

10. The inventory of the archives of the Pueblo, made by the retiring Alcalde in 1846, is dated at "Yerba Buena;" thus showing that the archives were kept at the latter place; which would not have been the case if it had not been within the Pueblo.

11. Every thing favors the presumption, that the Governor in 1834, perceived the necessity of establishing a Pueblo, at this place, for the convenience of the shipping, and in view of the fact that an important commercial town was likely to grow up at Yerba Buena. This was the place of anchorage for all the shipping; and Richardson admits that he perceived at a very early day, its advantages in a commercial point of view. Hence, he applied to the Governor as far back as 1825, and again in 1828, for a grant of land on the beach, between Rincon Point and Clark's Point. His petition was refused, and he renewed it in 1834, and again in 1840; but always without success, because, as there is every reason to believe, the Governor

foresaw the importance of reserving the lands fronting the beach, for purposes of commerce. Governor Figueroa had his attention specially directed to it in 1834, as appears from Richardson's testimony. He told Richardson that he had seen a communication of his to Governor Echendea respecting the anchorage at Yerba Buena, and inquired of him as to the possibility of laying off a town here. Richardson furnished him a sketch of the ground, and as he deposes, was soon after instructed to make a map of the town, which he did in October, 1835. At this period, Richardson was the *only* settler at Yerba Buena : and yet, in view of its commercial advantages, the Governor directed a town to be laid out. Entertaining these views of its importance, and future growth, it is not surprising that the Governor, in the latter part of the year 1834, ordered it to be erected into a Pueblo.

12. The peculiar location of the ground rendered it especially proper that it should be erected into a Pueblo. Surrounded on two sides by the Bay—on a third by the ocean, and on the remaining side by the Mission lands and Mission Creek—commanding as it does the entrance from the Ocean to the Bay, and embracing not only the Presidio and Old Fort, but the anchorage for vessels, the most superficial observer could not have failed to perceive that it was destined speedily to become one of the most important points on the Pacific coast. It is scarcely probable that its advantages were overlooked by Governor Figueroa ; and therefore, in breaking up the Mission establishment, he would very naturally have decided what should be done with the important peninsula to the north of it. That he would proceed to erect it into a separate Pueblo is almost a necessary conclusion from the facts ; and that he *did* do so, I think is abundantly established in proof. On the whole, there is no room to doubt, in my judgment, that but *one* Pueblo was established, and that within the limits described by Vallejo.

13. It will probably be argued by the Law Agent that no lands were ever assigned to Yerba Buena except those embraced in Richardson's map or sketch of the plan for the village. The argument on this point will be chiefly predicated on Richardson's testimony, which is by no means freed from suspicion. But conceding to the fullest extent the truth of all he deposes to, it establishes literally nothing in opposition to the views I have presented. The sum and substance of it is, that in October, 1835, he was directed by Jose Castro, Governor *ad interim*, to make a plan of the village about to be commenced at Yerba Buena—that he did make the plan, which was approved by the Governor and Legislature, and that he never heard of any other allotment of lands to the town than this. Richardson, in his testimony, is very minute in defining the boundaries of the plan made by him, and considerable stress is laid upon the fact that no provision was made for extending the boundaries as the population should increase. Hence, it is argued, the only town lawfully established was that embraced by Richardson's map. I confess I am at a loss to understand how all this can, in any degree, militate against the idea that the Pueblo was established in 1834. As the settlement of Yerba Buena was about to be commenced, it was quite natural that the Governor should cause the particular spot for the village to be de-

signated and laid out into streets and blocks, both for the sake of uniformity, and with a view to the granting of building lots to the inhabitants. But the fact that a plan for the village was formed and adopted, no more disproves the existence of a Pueblo, than the laying out of a county town would disprove the existence of the county, or the founding of a State capital the existence of the State, or the location of a village on a farmer's lands would prove that he owned no lands outside the village. So far as the founding of the village in 1835 proves anything germain to the subject, it certainly fortifies the inference that the Pueblo had already been established, and the village about to be formed was to be the nucleus of the new settlement. As a necessary part of the new Pueblo, there was needed a village in which building lots could be granted, and to which the municipal lands were to be appurtenant. The founding of the village, therefore, very speedily followed the establishment of the Pueblo; and instead of disproving the existence of the latter, is a strong circumstance in its support.

Against this overwhelming mass of testimony, all tending to maintain the fact that the Pueblo was established, as asserted by Vallejo, what proof has been offered in rebuttal, by the Government? I think I am justified in saying none whatever, except a few trivial facts, not inconsistent with the positions I have assumed, and for the most part of a purely negative character. For example, there are several witnesses,—Richardson, Alvarado, Castro, and perhaps others,—who testify that they never heard of the allotment of the lands and the marking out of the boundaries, as described by Vallejo. That may be so; and yet it goes a very little way towards establishing that the lands were not assigned and the boundaries fixed; and as opposed to the affirmative testimony of Vallejo, Halleck, Rose, Ford, and others, and especially the strong documentary evidence in the cause, is not entitled to the weight of a feather. Richardson, Alvarado and Castro were not residing here in 1834, and therefore could have had no personal knowledge of the marking out of the boundaries. If they heard of it at the time, they may well have forgotten it; and there is nothing improbable in the assumption that they did not hear of it, though the facts proved by Vallejo all transpired. In the then rude state of the country, when property was of little value, and the population was engaged almost exclusively in the breeding of cattle, but little attention was given to public affairs; and the fact of marking out a new Pueblo, embracing a territory almost uninhabited, was not likely to excite any special interest, or become a subject of general notoriety. Lands were of little or no value, as is proved by the enormous grants made gratuitously by the Government to private citizens; and it is altogether probable that the founding of the new Pueblo excited so little interest at the time, that it was but little talked of, and soon forgotten by the majority of those who heard of it. There were then no newspapers in California, to keep before the public the history of passing events; and no eager land speculators, on the look-out for good bargains in water-lots, (except perhaps the witness Richardson, who at a very early period had an eye upon the space between Rincon and Clark's Points;) and no cunning traders, claiming a monopoly of the whole of this valuable peninsula—one Jose Y. Limantour, whose name has since become very familiar to the people of this city, not having then made his advent into California. It is easy, therefore, to comprehend why the witnesses referred to may not have heard of so unimportant an event as the founding of a new Pueblo, in a territory almost without inhabitants; and still more easy to understand why they may not now remember it, even though they heard it at the time. Richardson, the chief witness relied upon by the Government, testifies under circumstances well calculated to excite suspicion as to his fairness. He was in the city of Mexico in June, 1852, and met his former acquaintance, Limantour, there, and conversed with him about the enormons claim which the latter was then about to assert, to almost the whole of the lands claimed by the city in this case; and yet, according to Richardson's testimony, not a word was said between them as to the boundaries of the Pueblo lands, or the limits of the village of Yerba Buena. Limantour must have known that Richardson was the first settler at Yerba Buena, and in conversing about the claim of the former to lands of such immense value, bounding on the village, it is certainly a little strange that nothing was said about the limits of the town. Richardson further testifies that when Vioget was making his map of the village, in 1839, he (Richardson) was very particular in pointing out to him the old limits, as defined on Richardson's map. Vioget remembers nothing of this, and says, on the contrary, that he never saw or heard of Richardson's map until it was shown to him at Richardson's house, about a year ago, by *Limantour*. His position as a witness is, to say the least of it, equivocal; and if the facts he deposes to were really important, (which they are not,) his testimony is entitled to but little weight.

On the whole, no testimony entitled to be seriously considered has been offered by the Government, to rebut that adduced by the claimant. But though the claim of the city, in my judgment, is satisfactorily established, it is quite evident that very much of its most important documentary evidence has been lost by the destruction and mutilation of the archives at Monterey, and by the ravages of fire, and from carelessness or fraud in relation to the archives in the Alcalde's office at San Francisco. The testimony of Capt. Halleck is conclusive on this point. If, therefore, important links should be wanting in the chain of documentary proof, its absence may be readily accounted for by the facts already adverted to. Considering that the archives at Monterey, for many weeks, were piled up in a loose heap, on the floor of a room used as a hospital for soldiers and marines, and were used as waste paper; and in view of the fact that no provision was made by law for preserving the archives of the Alcalde's office, and that several destructive fires have swept over that portion of the city in which the public offices were situated; the only matter of surprise is that we have been able to present so much documentary proof, and not that we have not offered more.

I conclude, therefore, that we have fully established the fact that the Pueblo was formed, and its limits defined, in November, 1834.

The next point to be considered is, whether or not the Governor and Territorial Deputation had the lawful authority so to establish the Pueblo; and on this point I shall offer only a few remarks.

In the first place, it is a principle very often recognized by the Supreme Court of the United States, that "the acts of an officer to whom a public duty is assigned by his Government, within the sphere of that duty, are *prima faciæ*, taken to be within his power." (United States *vs.* Aredondo, 6 Pet. 691; United States *vs.* Percheman, 7 Pet. 51; United States *vs.* Clarke, 8 Pet. 436.)

In Delassus *vs.* United States, (9 Pet. 134,) the Court says "A grant ~~of~~ or concession made ~~to~~ by that officer, who is by law authorized to make it, carries with it *prima faciæ* evidence, that it is within his powers. No excess of them, or departure from them, is to be presumed. He violates his duty by such excess, and is responsible for it. He who alleges that an officer intrusted with an important duty has violated his instructions, must show it."

So far has the principle been carried, that "where the act done is contrary to the written order of the King, produced at the trial, without any explanation, it shall be presumed that the power has not been exceeded; that the act was done on the motives set out therein, and according to some order known to the King and his officers, though not to his subjects." (Strother *vs.* Lucas, 12 Pet. 438.)

In United States *vs.* Percheman, (7 Pet. 95,) the Court says: "Papers translated from a foreign language, respecting the transactions of foreign officers, with those powers and authorities we are not well acquainted, containing uncertain and incomplete references to things well understood by the parties, but not understood by the Court, should be carefully examined before we pronounce that an officer, holding a high place of trust and confidence, has exceeded his authority."

In the case now under consideration, the act in question, to wit, the establishment of a new Pueblo, was done by the Governor and Territorial Deputation, exercising the highest political power conferred upon any officer or body politic in the Departments of the Mexican Republic. They were authorized to grant lands, collect taxes, and by suitable laws provide for the general welfare; and by the act of the 17th of August, 1833, were specially authorized to secularize the Missions and convert them into Pueblos. All police and economic regulations were peculiarly within the sphere of their powers, and I think it is evident that upon the principles established in the decisions above quoted, the Court will infer that they had the power to do what they have done. But if it be incumbent on us to show, in express terms, the authority to perform the act, the task will not be a difficult one.

The decree of the Departmental Deputation of the 3rd of November, 1834, directing the Governor to proceed to the election of an Ayuntamiento for the new Pueblo is stated by Governor Figueroa, in his despatch to Vallejo of the 4th of November, enclosing a copy of the decree, to have been predicated on the powers conferred upon the Deputation by the law of the 23rd of June, 1813. The first section of that law is as follows:

"Art. 1. It being the duty of the Provincial Deputations to see to the es-

tablishment of Ayuntamientos in the Pueblos where there are none, in the manner prescribed by article 335 of the Constitution, they shall take an exact account of the number of inhabitants in each Pueblo where an Ayuntamiento ie to be establissed, so that if of itself or with the adjoining district it should have a population of one thousand souls, one be established immediately; or if the population do not amount to that number, but for other reasons of public utility it would be necessary to establish it, that the "expediente" be formed proving this fact; these proceedings and those which the Deputation may form, having previously obtained the necessary information from towns in the district, relative to the *limits* of the Pueblo where the new Ayuntamiento is to be established, will be remitted by the Political Chief, with the assent of the Deputation, to the Government."

This law continued in force after the independence of Mexico, and plainly prescribed the duties of the Deputation, in the establishment of Ayuntamientos in the new Pueblos. It may be argued, however, by the Law Agent, that by this law the Deputation could only establish the Ayuntamiento where the population of the new Pueblo of itself, or with the adjoining district, amounted to one thousand souls; and that otherwise the matter was to be referred to the Government for its approval. Conceding, for the sake of the argument, that this is the proper interpretation of the Act, I maintain, 1st, that the Deputation is to decide the fact whether or not there is sufficient population (to wit, 1000) to authorize the immediate establishment of the Pueblo, and if it proceeds to establish it, the law will infer that it was properly done, and that the power was lawfully exercised. It is a familiar principle, that where certain preliminary steps are to be taken by a public officer, in the performance of a duty, he will be presumed to have done all that was essential to give validity to the Act. When the Deputation therefore decided to establish the Ayuntamiento, the law presumes it had taken all the necessary preliminary steps for that purpose; 2d, it is evident, that where the population was ascertained to be less than one thousand, the Deputation, under the law above quoted, was nevertheless to proceed to establish the Ayuntamiento, if reasons of public utility demanded it; in that event, however, transmitting a copy of its proceedings, and a statement of the limits of the Pueblo, to the Government for its approval. In the meantime, until this approval was had, the Ayuntamiento proceeded to perform its functions, and until disapproved by the supreme Government, would continue in office as fully in all respects as if its organization had been expressly ratified. I may remark here also, without much digression, that the reference by Figueroa to the Act of 23d June, 1813, as the authority for the proceedings of the Deputation, affords another convincing proof of the formation of the Pueblo. That portion of the Act which confers the authority, relates exclusively to the establishment of Ayuntamientos in *Pueblos where none before existed.* The proceeding, therefore, under this Act to establish an Ayuntamiento is a distinct admission of the fact that there was a Pueblo requiring an Ayuntamiento.

Act 23 June

Inasmuch, therefore, as it was incumbent on the Deputation and Political

Chief to provide Ayuntamientos for new Pueblos, and in fact to administer all the internal affairs of the department, there is no room to doubt that they were fully authorized to establish new pueblos. The remote and isolated condition of the frontier provinces rendered it indispensable that this power should be confided to the home functionaries, without the necessity of applying to the Supreme Government. It is scarcely probable, that in California, two thousand miles removed from the Capital of the Republic, no power was delegated to the highest local functionaries to perform so unimportant an act as the founding of a new pueblo for the convenience of the inhabitants, or the benefit of trade and agriculture. On the breaking up of the Missions, as we have seen, this power was expressly conferred, in reference to the Mission establishments ; nor can it be doubted, I think, that the same power before existed in reference to pueblos generally. In the case of the Missions, it required a special delegation of authority, because the Mission lands had before then been excepted from such uses, and dedicated to another purpose.

This concludes all that I have to submit, in reference to the establishment of the Pueblo, and defining its boundaries.

I proceed now to the last proposition, which I shall bring to the attention of the Board, to wit : That on the 7th July, 1846, the town of Yerba Buena or San Francisco was in existence, and that by the 14th section of the Act of Congress, of March 3d, 1851, organizing this Board, a grant will be presumed.

The section above referred to, provides "that the provisions of this Act shall not extend to any town lot, farm lot, or pasture lot, held under a grant from any corporation or town to which lands may have been granted for the establishment of a town by the Spanish or Mexican Government, or the lawful authorities thereof ; nor to any city, or town, or village lot, which city, town or village existed on the 7th day of July, 1846, but the claim for the same shall be presented by the corporate authorities of the said town, or where the land on which the said city, town or village was originally granted to an individual, the claim shall be presented by or in the name of such individual ; and the fact of the existence of the said city, town or village on the said 7th July, 1846, being duly proved, shall be prima faciæ evidence of a grant to such corporation, or to the individual under whom the said lot-holders claim."

In this provision the Government has exhibited another proof of its liberality towards the towns and villages of the newly acquired territory. It has placed them upon a favored footing, and given them the fullest benefit of all presumptions in their favor. As in 1812, they confirmed by a special act, all the village claims in upper Louisiana, without any other proof of title than that derived from prior occupancy, so in this enactment they require no other proof of title to city, town, or village lots, than that the town existed at the time when the United States took possession of the country on the 7th July, 1846. But it will be perceived that the Act provides for two classes of cases, to wit : 1st, *town lots, farm lots* and *pasture lots,* "held under a grant from any corporation or town to which lands may have been granted for the establishment of a town by the Spanish or Mexican Governments or the lawful authorities thereof;" and, 2nd, *city, town* or *village* lots, "which city, town, or village existed on the 7th day of July, 1846." In either case, the claim is not only to be presented by the corporate authorities, but the fact that the town existed on the 7th July, 1846, will raise a presumption of a grant. The question, however, will naturally arise, "a grant for what?" Is it for all the land claimed, or for that embraced by the limits of the town as they were known and recognized or established by law on the 7th July, 1846? The latter is my construction of the Act. If, for example, the town claims under no grant from the former Government, and is, therefore, entitled to no "farm lots" or "pasture lots," then its claim can only extend to the limits of the town, as they were known or established on the 7th July, '46. But, if it claims farm lots and pasture lots, by virtue of an alleged grant, then on proving the limits embracing the said lots as the same were known or established on the said 7th day of July, a grant shall be presumed co-extensive with those limits. The Act can scarcely mean, that where farm lots and pasture lots are claimed there must be actual proof of a grant before the town can claim the benefit of the Act. If it could establish the grant in proof, it would stand in no need of the presumption which the Act raises in its behalf. It would rest upon the grant itself as a sufficient title, and the section above quoted would be a mere nullity, so far as it relates to this class of cases. It is obvious, I think, that where farm lots and pasture lots are claimed, it is only incumbent on the town to prove the boundaries of such lots as they were known or established on the 7th of July, '46, and then the law will presume a grant to that extent. Any other construction than this renders the Act a piece of useless verbiage, so far as it affects farm lots and pasture lots. But Congress manifestly designed to confer some especial benefit upon the claimants of farm and pasture lots. It did not intend to say to them, "first prove you have a valid grant, and then the law, as a special boon, shall *presume* a grant." It meant no such mockery as this; but simply, as before stated, that on proof of the boundaries as they were claimed or known in July, '46, a grant shall be presumed for all the land within the boundaries. That this is the proper construction, is proved by the last clause of the section, which provides that "where any city, town or village shall be in existence at the time of *passing this act*, the claim for the land embraced within the limits of the same may be made by the corporate authority of the said city, town or village." This clause establishes a third class of cases, to wit: those in which the city, town or village did *not* exist on the 7th July, 1846, but *did* exist at the passage of the Act. In the latter case, the claim might be presented by the corporate authorities; but there was to arise no presumption of a grant. This is the distinguishing feature between the last class and the two former ones; and the reason is perfectly obvious, to wit: that when the towns existed, whilst the country was under the dominion of Mexico, the United States would require no evidence of a grant, carrying out the same liberal policy which was extended by the Act of 1812 to the villages of upper Louisiana. But where the towns were purely of American growth, and sprung up after we took possession of the country, there was no motive for the same liberality, and no reason whatever why a grant should be presumed. I think this interpretation of the Act is too obvious to require further argument, and I conclude that in the case of farm and pasture lots, all that is needed to raise a presumption of a grant is, that they were claimed as such on the 7th July, 1846, and to establish their boundaries as claimed.

But what is meant in the Act by "farm lots and pasture lots?" The Courts of Missouri have had considerable difficulty in determining what was meant in the Act of 1812 by "town or village lots, out lots, common field lots and commons, in, adjoining, and belonging to the several towns," &c. The difficulty has arisen chiefly in construing the terms "out lots" and "common field lots;" but, as I do not propose to enter at length into a discussion of those terms, I refer the Board to the following cases, in which the whole subject has been elaborately treated by the Supreme Court of Missouri:—

Page *vs.* Scheibel, 11 Mo. R. 167.
Harrison *vs.* Page, 16 Mo. R. 182.
Kissell *vs.* Schools, 16 Mo. R. 553.
Hammond *vs.* Schools, 8 Mo. R. 65.
Trotter *vs.* Schools, 11 Mo. R. 69.
Eberle *vs.* Schools, 11 Mo. R. 247.

From an examination of these cases, it will appear, that in ascertaining the meaning of those terms, reference must be had to the laws, usages and customs of the former Government. When the Act of 1812 speaks of a "common field lot," it of course intends to designate something which was known by that description, under the customs and usages of the former Government. So when the Act of March 3d, 1851, speaks of "farm lots and pasture lots" as appurtenant to a village, it necessarily refers to lands which, according to the usages of the Mexican Government and people, come under that designation. Congress evidently meant by that description what would more properly perhaps have been designated as common lands and municipal lands, (egidos and propios,) the former being used for pasturage and the latter for cultivation. These were the only lands appurtenant to a town, except garden lots ([redacted]) and the inference is irresistible that it was the "egidos and propios" to which Congress refers as "farm lots and pasture lots." Otherwise, these terms can have no effect as applied to a Mexican village; and considering that at the passage of the Act, we had but recently acquired the country, and were not familiar with the tenure by which village lands were held, the terms employed by Congress should not be very accurately criticised, but should receive such a construction as will most effectively carry out the liberal views entertained by the Government in reference to these village claims. I conclude, therefore, that the terms "farm lots and pasture lots" are synonymous with common lands and municipal lands, or "egidos and propios." According to the views I have presented, it is incumbent on us, in order to come within the provisions of the 14th section, to prove two facts, to wit: 1st, that the town existed on the 7th July, 1846, which has been proved and will not be denied; 2d, that at that date, there were "egidos and propios" claimed and known as such, with defined limits, and which were appurtenant to the town. This fact, we insist, has been conclusively established by the testimony of Vallejo, Halleck, Rose, Ford, and others, as well as by the documentary evidence; and therefore, under the 14th section, the law will presume a grant to the extent of those limits. Upon this ground we claim to be entitled to a confirmation to the Vallejo line.

I have thus at great length, and perhaps with more minuteness of detail than was necessary, presented my views of this important cause. But the magnitude of the interests involved, and the numerous questions of law and fact, (some of them novel and complicated in their character,) which have arisen in the progress of the cause, must be my apology for the prolixity with which I have discussed them. It is the first time in the history of the United States, and perhaps of the world, when the title to all the real estate in a city of fifty thousand inhabitants is to be submittd in a single cause to a Judicial tribunal. In such a cause I am duly conscious of the vast responsibility which rests upon the counsel and the Court; and having now to the best of my ability, discharged my duty, I respectfully submit the cause to the Board for its decision.

J. B. CROCKETT,

Of Counsel for Claimant.

SAN FRANCISCO, 16th May, 1854.

9

A PAMPHLET RELATING TO THE CLAIM OF SEÑOR DON JOSÉ Y. LIMANTOUR, TO FOUR LEAGUES OF LAND IN THE COUNTY ADJOINING AND NEAR THE CITY OF SAN FRANCISCO, CALIFORNIA.

PUBLISHED BY ORDER OF THE CLAIMANT.

SAN FRANCISCO:
WHITTON, TOWNE & CO., PRINTERS, EXCELSIOR JOB OFFICE,
No. 151 Clay Street, third door below Montgomery.
1853.

"THE LIMANTOUR CLAIM."

TO THE PUBLIC.

In the month of February, 1853, José Y. Limantour presented his petition to the Honorable the Board of Land Commissioners appointed to ascertain and settle private land claims in the State of California, to have confirmed to him two certain tracts of land, situate in the county of San Francisco. The lands claimed were described in the petition.

Soon after Mr. Limantour had presented his petition to the Board of Commissioners, the press called public attention to the claim, published the petition, commented upon it with great severity, and evinced an evident intent to prejudice the public mind against it.

From that time to the present, there has occasionally appeared, in some of the city papers, notices of the "Limantour Claim," with hints, inuendoes and imputations of fraud or forgery, or some other dark crime, as connected with it.

Not a few individuals, pretending to claim large tracts of very valuable land within the boundaries of the Limantour claim, have been busy in their street conversations, in denouncing the claim as false and fraudulent.

While these charges have been freely made, unaccompanied and unsustained by the slightest show of evidence, Mr. Limantour has pursued the even tenor of his way, submitting his papers and his documentary evidence, taking his proofs in the legal form and preparing, in a quiet, unostentatious manner, to submit his claim to the consideration of the enlightened tribunal established by law to pass upon its validity.

Severe newspaper articles, false rumors and slanderous imputations, he has not thought it worth his while, hitherto, to notice. He does not feel that his duty to himself, considering the right which he has, in common with all his fellow-men, to protect his own good name and credit, nor that his duty to the public requires him longer to remain silent; he therefore instructs the undersigned, his agent and attorney, to prepare a plain statement of the facts of his case—to present therein, fairly, his documentary and other evidence, that the same may be laid before the public in a pamphlet form—that all who have an interest or a desire, may refer to it for the purpose of satisfying their own minds, *from their own examination*, of the truth and validity—or the falsity and fraud of his claim to the lands described in his petition.

In performing the duty required of the undersigned, by his client, it is proper to inform the public who SEÑOR JOSÉ YVES LIMANTOUR is, and briefly to state the business to which he has devoted himself for the last fifteen years of his life.

He is by birth a Frenchman, and he still claims France as the country to which he owes allegiance. His early life he passed upon the sea, engaged in navigation and commerce.

In the year 1831, he came from France to the port of Vera Cruz, in Mexico, and for several years subsequent to that period, was engaged in commercial enterprises from his native country to that, the most important Mexican port on the Gulf.

In the year 1836, Mr. Limantour came round into the Pacific, and prosecuted his business along the coast of that ocean, from Lima northward. Since the time last mentioned, this Pacific coast has been the theatre of his navigating and commercial operations.

In the month of September 1841, he made a voyage to the ports of Mexico and Lower and Upper California.

On the 26th day of October, A. D. 1841, while attempting to make the entrance of the Bay of San Francisco, he had the misfortune to lose his vessel, the *Ayucucho*, on the point El

Reyes. His vessel was lost, but some portion of the cargo was saved. By the aid and kind assistance of some people at Saucelito, Sonoma and other places, his money, goods and merchandize were saved from the wreck of his vessel, and he was enabled to reach this place, then called Yerba Buena.

Mr. Limantour was detained here nearly a whole year, being unable to procure a suitable vessel to get away, with safety to himself and the property which he had secured from his lost ship.

I must request those who think proper to read this statement, to note this date, viz: the last of October or first of November, 1841, when Mr. Limantour arrived here in Yerba Buena, as then called, now San Francisco, and the fact of his detention here until the autumn of the year 1842.

During his stay here he had abundant opportunity, and he availed himself of it, to become intimately acquainted with this wonderful Bay of San Francisco—the country around it, and particularly with the little town of Yerba Buena—then just beginning to assume some importance in the eye of an experienced, practical navigator and a diligent, sagacious, skillful merchant.

In December, A. D. 1841, while Mr. Limantour resided on the then almost desert shore of Yerba Buena, a vessel came into the Bay from Oregon with several of the officers of the Hudson's Bay Company on board. Amongst the passengers on that vessel was an agent of the French Government, Mr. Duflot de Maufras, who had been sent on a special mission to this coast with a view of enlightening them on the resources and the importance of California and Oregon. M. Duflot de Maufras, who has since published an elaborate and able work on California, having learned on his arrival that there was a countryman of his at Yerba Buena, sought him out and imparted to him the impression he and the English officers entertained of the importance of the Bay of San Francisco, commercially, as well as politically, and the almost certainty of the country soon belonging to England, which was anxious to obtain it in payment of the debt due British capitalists by Mexico. M. de Maufras remarked that the whole conversation of the Hudson's Bay agents turned on that subject, and that if he, Mr. Limantour, "could obtain a grant of land on the Bay of San Francisco, he would one day be as rich as a prince." Mr. Limantour replied—"Since your conviction is so strong in this respect, why don't you petition for them or buy them yourself?" "It is impossible," rejoined M. Duflot de Maufras; "I wear the public livery—I am a public servant—I must go through with the mission chalked out for me."

This conversation settled deep into Mr. Limantour's mind and had a powerful influence with him in the bargain he subsequently made for the purchase of the property he now claims, and which is set forth in his petition in the case under consideration.

During Mr. Limantour's stay at Yerba Buena, from October 1841, to the autumn of 1842, he learnt its whole history from those longest and best acquainted with it. There was hardly a person of any consequence residing here, or at the Mission Dolores, or in the country immediately surrounding the Bay, whom he did not know personally, and with whom he was not on terms of intimate acquaintance. He understood their language sufficiently to hold free and familiar intercourse with all of them.

After a detention here of some eleven months, viz: until late in the autumn of 1842, he succeeded in procuring a small vessel from General M. G. Vallejo, and which, in honor of one of the daughters of the General, he named "*The Fanny.*" On this small vessel he embarked the remainder of his goods and effects and sailed down the coast, stopping at the ports of Monterey, Santa Barbara and San Pedro.

It will not be improper here to say that Mr. Limantour, by his energy as a navigator, and his indefatigable industry, enterprise and skill as a merchant, had, at that time, become a man of large property and abundant means. On his passage down the coast in the autumn of 1842, he went into the port of San Pedro, and there anchored his little craft on the first or second day of January, A. D. 1843.

It is proper here to direct attention to another train of events which had been going on for a few years previous to 1842, in California and Mexico. In the years 1835 and 1836 California had been agitated by some political dissensions. The Governors who had been sent from Mexico, had been forcibly driven from Upper California. In 1837 Upper California assumed, for a short time, the attitude of an independent state, with Don Juan B. Alvarado at its head.

Mexico, in order to preserve the Department of Upper California in its connexion with the mother country, and to prevent its separation therefrom, found it necessary to temporize for a while, and thought it advisable to confer upon Señor Don Juan B. Alvarado the office of "Gefe politico," or Governor, by which measure of policy the Home Government hoped to bring back the revolting State to its former allegiance.

The measure was successful for the time being. Governor Alvarado accepted the office tendered to him by the government in power in Mexico; acknowledged the Supreme Government thereof, and thereby put an end to the "Independent State of Alta California."

Governor Alvarado continued to exercise the functions of that office until the year 1842. At this last date, viz. 1842, His Excellency Antonio Lopez de Santa Anna, was at the height of his power; in fact, absolute Dictator of Mexico. His Excellency Santa Anna, seized the occasion which was then afforded him, by the local jealousies existing between some of the prominent men in Upper California, to secure, more perfectly, that Department to Mexico, by the appointment of Señor Don Manuel Micheltorrena, a general officer in the Mexican Army, a devoted and unwavering friend of General Santa Anna, as Governor of the Department of the Californias.

His Excellency President Santa Anna's instructions to Micheltorrena, were issued on the 11th of February, A. D. 1842, in the City of Mexico.

The Treasury of Mexico was then destitute of funds. The Supreme Government were unable to furnish their recently appointed Governor with the means necessary to carry on the Departmental Government. Micheltorrena was sent from Mexico for the seat of his new Goverment in the summer of 1842. He arrived in Upper California about September of that year. He had under his command some four or five hundred men, who had been furnished him by Mexico, and who were called soldiers, but he was almost entirely destitute of provisions, money, munitions, means of transportation, or supplies of any kind for his own support or that of his followers.

From the want of such supplies he was detained at the small town of Los Angeles, in the south part of Upper California, for some months. It was while Governor Micheltorrena was thus detained there, that Señor José Y. Limantour arrived in the port of San Pedro with his little vessel, which he had purchased from General Vallejo, as before stated.

The port of San Pedro is some twenty or twenty-five miles from the town of Los Angeles.

The attentive reader will observe the relative position of Governor Micheltorrena and of Mr. Limantour, in regard to place, at the commencement of the year 1843.

The remaining part of this pamphlet will consist principally of copies of the documentary evidence and other proofs now on file before the Honorable the Board of Land Commissioners, which Mr. Limantour has taken thus far in support of his claim, with such brief notes as may be deemed important in explanation, and for the more readily applying and understanding their force and bearing.

To these documents and proofs Mr. Limantour solicits the careful and scrutinizing attention of the public.

First—Attention is solicited to an original letter written by Gov. Micheltorrena to Señor Don José Y. Limantour, dated on the 8th day of January, A. D. 1843, at the town of Los Angeles. The original is on file; its genuineness abundantly proved, as will be seen by the certified copy from the Secretary of the Board of Commissioners, and the following depositions. It is as follows:

SÑR D. JOSÉ Y. LIMANTOUR.

Township of Los Angeles, January 8th, 1843.

DEAR SIR:

Three months have nearly elapsed, since for want of all species of resources, I have not been able to march my troops towards the Capital. I am in a very wretched position.

Mr. D. Luis Vignes, a countryman of yours, has apprized me of your arrival, and that you have on board both money and merchandise. I would be under obligations to you, if you could let me have such money as is in your power, as well as such of your merchandise, my troops and officers stand in need of. I will give in payment, sight drafts, payable at Mazatlan, by the house of Beecher & Co. I further promise to secure to you the contracts of all that which the Department may require, and also that which you may want for your vessel, to carry a profitable trade. I will use my best endeavors so that you realize great advantages. Should you prefer lands in this country, I can give you such of them as you may select, which are vacant, inasmuch as I have full powers to that effect in both the Californias. And above all, that it is necessary for my troops to live, and extricate ourselves from this wretched condition.

If you can, Mr. Limantour, do me the favor to call and see me forthwith, we will talk over the offers I make and which I hope you will accept.

I am desirous of the honor of conversing with you ; meanwhile, I remain your polite servant, and affectionate friend, (B. S. M.)

MANL. MICHELTA.

The undersigned, principal Clerk of the Ministry of Foreign Relations,

{ *Ministry of Relations, L. S.* } *Certify the signature of*
SR. D. MANUEL MICHELTORENA,
Former Governor and Commandant-General of the Department of the Californias, found on the reverse, to be authentic. Mexico, Oct. 29th, 1852.

Fees, four dollars. I. MIGUEL ARROYO.

No. 1738. *Consulate of the U. S. of America,*
Mexico, November 2nd, 1852.

I, the undersigned, for the city of Mexico, hereby certify that the signature of I. MIGUEL ARROYO, subscribed to the foregoing certificate, is in the proper hand-writing of said person, the same as used by him in all his official acts, who is well known to me, and was at the time of subscribing the same, first clerk of the

Department of Interior and Foreign Relations of the Mexican Government, and that all his official acts are entitled to full faith and credence as such.

{ *Register F, folio* 263. } *In testimony whereof, I have hereunto*
{ *Fees,* $2. *L. S.* } *set my hand and affixed the Consular Seal, the day and year first above written.*

JOHN BLACK, *Consul.*

I, George Fisher, Secretary of the Board of United States Commissioners, to ascertain and settle the private land claims in the State of California, hereby certify that the foregoing is a true and correct translation of an original paper on file in this office, in case No. 548, J. Y. Limantour, and in my charge and keeping, as such Secretary.

Witness my hand this twenty-third day of July, 1853.

(Signed) GEO. FISHER, *Sec'y.*

The second document is the application of Señor José Y. Limantour to Governor Micheltorena, dated at the Pueblo de Los Angeles, on the tenth day of January, A. D. 1843, in which Mr. Limantour proposes to purchase for a price named, the two tracts of land claimed in his petition. The original of this document is found among some of the archives of the former government, now in the possession and under the custody of J. Gleason, Esq., the Deputy Clerk of Monterey County. As to its genuineness, the reader will please to refer to the depositions of Gomez and Hartnell, as also to the corroborating testimony of Jimero and Francisco Arce, and others hereinafter to be found.

TRANSLATION.

Seal of the fourth class, two reals.

Authorized provisionally by the Maratime Custom House of the port of Monterey, in the Department of the Californias, for the year Eighteen Hundred and Forty-Three.

(Signed) MICHELTORENA.

(Signed) MANUEL CASTAÑARES.

{ *Custom House Seal.* }

Jurisdiction of San Francisco.

Let this be remitted to the competent justice, for him to report whether the two tracts of land mentioned in the present memorial of the French citizen, Joseph Limantour, belong to private persons, corporation or community, and after the corresponding investigations have been made, let the Expediente be returned for the necessary ends which may be required.

Pueblo de los Angeles,
January 11th, 1843.
(Signed)
MICHELTORENA.

Most Excellent Governor:

I, Joseph Y. Limantour, Captain of the French Marine, before the justice of your Excellency, do with due respect make the following proposals:

First. That I will deliver to the Departmental Treasury a receipt for the sum of Four Thousand Dollars, on account of a larger amount due me from the public hacinda.

Second. That your Excellency will be pleased to grant me for said receipt, the ownership of the two tracts of vacant land, whereof I accompany the plots, and that in first in the land comprised from the line of the Pueblo of Yerba Buena, at the distance of four hundred varas from Mr. William Richardson's old established house (casa fundadora,) towards the S. E., according to a rough map which I have seen in said Richardson's house, and according to the information of the inhabitants and the justices of the peace, beginning at the beach on the N. E. and following all the edge of the beach, turning round Rincon Point to the S. E. and following the Bay to the mouth of the Mission Creek, including the salt-water plains, and following the Canâda to the S. W. to where the fresh water runs for use, passing on the N. W. side about two hundred varas from the Mission, until where the two leagues (a little more or less) are completed from the N. E. and S. W., in length and in breadth what there may be from the line of the Pueblo from S. E. to N. W. to the Rincon, as appears by the plot which accompanies No. 1.

Third. Two leagues of land, a little more or less, beginning on the beach of the Estacada, at the old anchorage of the port of San Francisco, underneath the Castle, and following towards the S. E., passing the Presidio—following the Mission road and the line of the S. W. to the beach which runs to the S. of the port—taking said beach on the N. W., turning round Point Lobos, and following to the N. E. all along the beach of the Castle, leaving free the land occupied by said Castle—that is to say, about two hundred varas, and following the beach to the Estacada, where the accompanying plot No. 2 begins.

I therefore request that your Excellency will grant me in payment of the said sum of Four Thousand Dollars, the two tracts of land above mentioned, under the express condition that I may take possession of them when it may best suit me, and without being under the obligation of subjecting myself to any of the conditions prescribed by the colonization law, because my object is to receive said lands not in the class of a gratuitous grant for colonizing, but in the class of a real and true purchase, so that I may sell them—and in fine, enjoy them as may best suit me as my property.

Pueblo de los Angeles, January 10*th*, 1843.

(Signed) J. LIMANTOUR.

Angeles, February 25*th*, 1843.

The competent justice having taken and made all the necessary steps and investigations respecting the two tracts of land asked for by the French citizen, Joseph Limantour, and the result being, that said two tracts of land are vacant—the former situated one league, a little more or less, from the line of the Pueblo of Yerba Buena (at the distance of four hundred varas from the house of Mr. William Richardson) to the Bay, and two leagues N. E. S. W. a little more or less;—the second, one league, a little more or less, N. E. S. W., and one league and a half in length, leaving free the land of the Castle, two hundred varas (200 varas,) the said tracts of land mentioned by the said Don José Limantour, Captain of the French Marine, in his petition are granted to him.

Let the title of ownership for the said two tracts of land be made out, in consideration of the good services which he has rendered to the Department.

(Signed) MICHELTORENA.

I, the undersigned, do hereby certify the foregoing to be a true and faithful translation of the original document in the county Recorder's office of Monterey county; and I furthermore certify, that I know the signatures of Manuel Micheltorena, and Joseph Limantour, attached to said original, to be the genuine signatures of the parties purporting to having signed the same.

(Signed) W. E. P. HARTNELL,
State Translator.

Monterey, 29*th June*, 1853.

I, George Fisher, Secretary of the Board of United States Commissioners, to ascertain and settle the private land claims in the State of California, hereby certify that the foregoing is a full, true, and correct copy of a paper on file among the archives of said Board, and in my care and custody, as such Secretary.

Witness my hand this 26th day of July, 1853.

(Signed) GEORGE FISHER, *Sec'y.*

A true copy of an original document in this office.

(Signed) GEO. FISHER, *Sec'y.*

The third document is a letter from Don Manuel Jimeno, Secretary to Governor Micheltorena, written under the direction of the Governor to Don Guillermo A. Richardson, Captain of the port of San Francisco, making inquiries in regard to the lands which Mr. Limantour proposed to purchase, and for the purpose of ascertaining whether or no the lands were vacant. The letter is dated at Los Angeles, on the 14th day of January,

1843. In connection with this letter, the reader will please to consult the depositions of Jimeno, Richardson and Arce. The original letter is on file, and its genuineness fully proved·

"His Excellency the Governor and Commandant General, desires to have in view information of all the vacant lands, existing in the margin of the bay of San Francisco, and those appertaining to the "Pueblo de Yerba Buena." He requires of you an exact information, accompanied with a plan or map showing clearly the desires of the Government itself, combining for the purpose with the Judge of that jurisdiction. Captain Don José Y. Limantour has asked by way of payment, a grant of two leagues long by one wide, a little more or less, in the lands that he says do not appertain to the Puebla de la Yerba Buena, its boundaries commencing about four hundred varas of from your house, beginning from the side of the same beach, where it turns the whole side to two hundred varas distant from the Mission, and besides Capt. Limantour asks one league of land wide and one and a half long, commencing from "la Estacada" on "fondeadaro antique," taking along the beach to the N. W. turning to the "Punta de Lobos," and following to the N. E. along the beach of the castle, leaving the tract which said castle occupies, distant two hundred "varas," and following the beach to the "Estacada," where it began.

Therefore his Excellency the Governor orders me to state to you, that he relies on your *theoretical* and practical knowlege, in order that you send the required information.

God and Liberty; Angeles, January 14, 1843.

(Signed) MANUEL JIMENO."

Senor Capitan of the Port
of San Francisco,
DON GUILLERMO A. RICHARDSON.

I, George Fisher, Secretary to the Board of U. S. Commissioners to ascertain and settle the private land claims in California, do hereby certify that the foregoing is a true and correct copy of a paper filed in case No. 548, (wherein José Y. Limantour is claimant,) endorsed "Translation of Exhibit No. 1, A. F."

annexed to deposition of "Wm. A. Richardson," and among the archives of said Board, in my care and custody as such Secretary.

Given under my hand, this 22d day of September, 1853.

GEORGE FISHER, *Secretary.*

The fourth Document to which attention is asked, is a private letter from Señor Jimeno to Mr. Limantour, dated at Los Angeles on the 2d day of February, 1843, relating to the same business. The original is on file, and proved to be in Jimeno's hand writing, it is offered to show the progress of the business in regard to the land proposed to be purchased by Limantour.

SÑR. D. JOSÉ LIMANTOUR, Captain, *Angeles, 2d February,* 1843.

Dear Sir: I have received your polite letter, and have communicated it to the General, who is courteous to all, but having asked certain informations, it will be good to delay for a few days, and for you to call and see him. On my part I will do all that lays in my power, and should I leave him, you will be well recommended to my successor.

It will afford me pleasure to see you on your return from Mexico; meanwhile I remain your ob't. servant, &c. (B. S. M.)

MANUEL JIMENO.

I, George Fisher, Secretary of the Board of United States Commissioners to ascertain and settle the private land claims in the State of California, hereby certify that the foregoing is a true and correct translation of an original paper on file in this office, (No. 548, J. Y. Limantour,) and in my charge and keeping as such Secretary.

Witness my hand this 23d day of July, 1853.

GEORGE FISHER, *Sec'ry.*

If the reader will take time to reflect a moment upon the foregoing documents, he will not fail to observe the dates of each, and the place were they were written and executed. On the eighth day of January, 1843, Micheltorena writes to Limantour, soliciting in the most urgent manner, supplies of money and merchandise, and stating to Mr. Limantour that he could repay in drafts—that he, the Governor, would recommend him for government contracts;—and last of all and above all, stating to Mr. Limantour that he had full power to grant vacant lands in the Californias, and would do so if he and Mr. Limantour could negotiate. On the tenth of January, 1843, Mr. Limantour makes his application to purchase the two tracts of land now claimed by him in this case. On the eleventh of January, 1843, Governor Micheltorena makes his order for the inquiry, to ascertain if the lands which Mr. Limantour proposes to purchase, are vacant. On the fourteenth Jan'y, 1843, Jimeno addresses the letter of inquiry to Richardson, and on the twenty-fifth of February, 1843, Governor Micheltorena completes the expediente by saying, as in document No. 2, hereinbefore set forth, that "the competent justice had taken the necessary "steps and investigations respecting the said two tracts of land "asked for by the French citizen, José Limantour, and the result "being, that they were vacant," &c. "The said two tracts of "land mentioned by the said Don José Limantour, in his "petition are granted to him. Let the title of ownership for "the said two tracts of land be made out in consideration of "the good services which he has rendered to the Department."

Now, here comes the grant itself—executed in the town of Los Angeles, on the twenty-seventh day of February, A. D. 1843. Approved by the proper minister, connected with the Supreme Government of Mexico, on the eighteenth day of April, A. D. 1843. Read it—and say, who can, that my client is attempting to make available a false, fraudulent or simulated claim. The original document is on file with the Secretary of of the Board of Commissioners. It has been there for months. The genuineness of the signature of Governor Micheltorena thereto, has been abundantly proved. The most virulent opposer of the claim admits its genuineness, and hitherto not one scintilla of evidence has been offered to impeach the genuineness or validity of this document.

FIRST STAMPS. EIGHT DOLLARS.

Legalized temporarily, by the Maritime Custom House, of the port of Monterey, in the Department of the Californias, for the year One Thousand Eight Hundred and Forty-Three.

(Signed) MICHELTORENA.

(Signed) MANUEL CASTAÑARES.

Maritime Custom House of Monterey.

The citizen, Manuel Micheltorena, *Brigadier General of the Mexican Army, Adjutant Gen'l of the Staff of the same, Governor and Commandant General of the Department of the Californias:*

April 18th, 1843.

The Supreme Provisional Government of the Mexican Republic, in the exercise of the extraordinary powers, with which it is invested, and taking into consideration the good services rendered by the French citizen, Don. J. Y. Limantour, ratifies and approves the grant made—based upon preëxisting lawful provisions, and granted to the local authority of California, and by which it confirms the property granted of the vacant lands, which this document makes mention, which is returned to the party interested.

(Signed) BOCANEGRA.

Whereas, Don José Y. Limantour Captain of the French Navy, and a denizen of the Department has negotiated, in consideration of loans, in merchandise and ready money, which he has made to this Government at different times, to obtain the grant of the land contained from the line of the Pueblo de la Yerba Buena, distant four hundred varas from the settlement house (casa fundadora) of Don William Richardson to the south-east, beginning on the beach at the north-east and following it along its whole edge (margin,) turning round the point of Rincon to the south-east, and following the bay as far as the mouth of the estuary of the Mission, including the deposits of salt water and following the valley (Cañada) to the south-west, where the fresh water runs, passing to the north-west side, about two hundred varas from the Mission to where it completes two leagues north-east and south-west to the Rincón as represented by the plat (diseño) No. 1, which accompanies the Expediente.

Second. Two leagues of land, more

or less, beginning on the beach of the "Estacada" at the ancient anchorage of the port of San Francisco, below the Castle (castillo,) following to the south-east, passing the "Presidio" (military post)—following the road of the Mission, and the line to the south-west as far as the beach which runs to the south from the port, taking the said beach to the north-west, turning round the Point Lobos and following to the north-east, along the whole beach of the Castle (castillo,) two hundred varas, and following the beach as far as the "Estacada," where begins the plat (diseño) No. 2. Having previously instituted the suitable proceedings and investigations, and resulting from them, that the two before mentioned tracts of land are vacant, exercising the authority with which I am invested, in the name of the Mexican nation, I have resolved to make him a complete and absolute grant of the said two tracts of land, that he may enjoy them in the manner and when it may suit him, declaring them by these present letters his legal property. In consequence whereof, he may occupy the mentioned two tracts of land when it may most suit him, destining them to such use or culture as may best accommodate him. In consequence whereof, I command that the present title, being held firm and valid, a record of the same be made in the office of the Secretary of the Despatch, and that it be delivered to the party interested for his security.

Given in the town of Los Angeles, the twenty-seventh day of February One Thousand Eight Hundred and Forty-Three.

(Signed) MANUEL MICHELTORENA.
{L. S.}

The undersigned, chief clerk of the Department of the Interior and Foreign Relations, certifies that the signatures of Bocanegra, who was Minister of Relations, and that of Manuel Micheltorena, who was Governor and Commandant General of the Department of the Californias, which appear in this document, are genuine signatures.

(Signed) I. MIGUEL ARROYO.
Mexico, *October* 29, 1852.

No. 1751. *Consulate of the United States of America,*
Mexico, November 2nd, 1852.

I, the undersigned, Consul of the United States of America, for the city of Mexico, hereby certify that the signature of I. Miguel Arroyo, subscribed in the foregoing certificate, is in the proper hand-writing of said person, the same as used by him in all his official acts, who is well known to me, and was at the time of subscribing the same, first clerk of the Department of Interior and Foreign Relations of the Mexican Government, and that all his official acts are entitled to full faith and credit as such.

Register F, Folio 264.
Fees, $2. *L. S.*

In testimony whereof, I have hereunto set my hand, and affixed the Consular Seal, the day and year first before written.

(Signed) JOHN BLACK, *Consul.*

I, George Fisher, Secretary to the Board of United States Commissioners to ascertain and settle the private land claims in the State of California, hereby certify the foregoing to be a true and correct translation of an original paper on file in this office, in case No. 548, José Y. Limantour, and in my care and custody, as such Secretary.

Witness my hand this 26th day of July, 1853.

(Signed) GEORGE FISHER, *Sec'y.*

A true copy of an original on file.

GEORGE FISHER, *Sec'y.*

In the foregoing pages, the correspondence between Governor Micheltorena and Señor Limantour, and the correspondence by the Secretary of the Governor, making inquiries about the lands—the orders and decrees of the Governor—the original grant of the two tracts of land to Señor Limantour, by Governor Micheltorena, together with the approval of the Supreme Governor of Mexico of the grant, with the certificates of the chief clerk of the Department of the Interior and Foreign Relations, and of the American Consul at Mexico, have all been laid before the public.

The next document is a copy of a communication written by order of the most Excellent Señor President Santa Anna—by his Minister of Exterior Relations and Government—Bocanegra, to His Excellency Don Manuel Micheltorena, approving of the grants which had been made to Señor Limantour, and also granting permission for further grants to him of city, town or country property by the said Governor of the Californias. This document bears date in the city of Mexico on the seventh day of October, 1843, and the copy on file, verified by Governor Micheltorena and Secretary Jimeno, is dated the twenty-fifth of December, 1843. The proof of this document will be found in the second deposition of Mr. W. E. P. Hartnell.

The document is as follows:—

FIRST STAMP. EIGHT DOLLARS.

Provisionally legalized by the Maritime Custom House of the port of Monterey, in the Department of the Californias, for the year One Thousand Eight Hundred and Forty-Three.

MICHELTORENA.

MANUEL CASTAÑARES.

Stamp.

Manuel Micheltorena, Brgadier General of the Mexican Army, Adjutant General of the Staff of the same, Governor, and Commandant General of the Department of the Californias:

I certify that by the last mail arrived from the interior, I have received a note of the following tenor:

" Ministry of Exterior Relations and Government."—Account having been given to the Most Excellent Señor President of the official note of Your Excellency dated the 24th Feb. last, wherein you enclosed the memorial which Don José Y. Limantour, Captain of the French marine, made to this Government in order to acquire property in that portion of the frontier, His Excellency in consideration of the good deportment and services, which this foreign individual has rendered to that very Department, and conformable with Article 9th, of the Decree of the 11th of March of the year last past, whereby the Government reserved to itself the power of granting to foreigners that sort of permission, has been pleased to grant to him, the said Limantour, sufficient leave, that he may acquire, besides the property which he has already acquired and have been recognized by the Supreme Government, further country, town or any other property, conformably with the said decree, and other laws of colonization, which I have the honor to communicate to Your Excellency for your knowledge, and the purposes regarding thereto; presenting to Your Excellency again, the assurances of my high estimation and distinct esteem.

God and Liberty. BOCANEGRA.
Mexico, *October* 7, 1843.

To His Excellency the Governor and Commandañte General of the Department of the Californias. And at the request of said Limantour I grant these presents, containing a legal copy, the original remaining in the archives of the Government, which (copy) in testimony I sign with the Secretary of Despatch in Monterey, the 25th December, 1843.

(Signed) MANUEL MICHELTORENA.
(Signed) MANUEL JIMENO.

I, George Fisher, Secretary of the United States Land Commission to ascertain and settle private land claims in the State of California, do hereby certify that the foregoing is a true and correct translation of a Spanish document in the case No. 548, (José Y. Limantour,) now on file in this office.

(Signed) GEORGE FISHER, *Sec'y.*
San Francisco, *October*, 1853.

Having presented the foregoing documents, I propose now to submit to the public for examination and full and mature consideration, perfect and entire copies of the depositions taken hitherto in support of the claim of Señor Limantour, to the two tracts of land mentioned in the deed of Governor Micheltorena to him, dated February 27th, 1843, and herein before set forth.

The first deposition is that of Señor Don Manuel Jimeno.

In regard to this deposition of Señor Jimeno, in justice to myself I ought to say that it was taken within a very few days after the petition of Señor Limantour was filed with the Secretary of the Board of Land Commissioners. I had only a short time to examine the papers of my client, and was much embarrassed in my investigations of his cause, by not being able at that time, to read the Spanish language with facility, or to converse freely with a witness who spoke no other. Señor Jimeno was about leaving California for the City of Mexico, on the 15th of Feb'y. 1853, when his deposition was taken, and I was obliged to take his deposition somewhat in a hurry, and before I had obtained that full knowledge of all the facts and documents relating thereto, which I have acquired since that time. I can only say that I should be most happy if I could now have the opportunity of a further examination of Señor Jemino; a witness so intelligent, honest and conscientious,—with the advantage I should now have of calling his attention to various original letters, papers, documents and books in the archives of the former Government, the existence of which I did not know at the time his deposition was taken. This witness is not in California, and has not been to my knowledge since February, 1853, and I do not know as it will be in my power to get his further testimony. His deposition is submitted as follows:

San Francisco, *Feb.* 15*th*, 1853.

On this day, before Commissioner H. I. Thornton, came Manuel Jimeno, a witness in behalf of the claimant, José Y. Limantour, petition No. 548, and was duly sworn, his evidence being interpreted by the Secretary.

QUESTIONS BY CLAIMANT.

Question 1.—What is your name, age and place of residence?

Answer.—My name is Manuel Jimeno—my age forty-nine years, and my residence in Monterey county.

Question 2.—Do you know Don Manuel Micheltorena, formerly Governor of California, and do you know José Y. Limantour, the petitioner in this case?

Answer.—I am acquainted with both these persons.

Question 3.—Do you know if those two persons were together in the city of Los Angeles in Upper California, in the winter of 1842 and 1843. If yes, state if you know that negotiations were at that time going on between them, and what were those negotiations about. Please to state all you know about that matter?

Answer.—I know that those persons, Micheltorena and Limantour were at the city of Los Angeles at the close of the year 1842, and the beginning of the year 1843; as to the business between those persons, I know that Limantour sold on credit to Micheltorena for the use of the army goods, in payment of which he received drafts on the Custom House at Mazatlan and on the Government of Mexico, as I understood from Micheltorena. I understood that he was soliciting from Micheltorena grants of land, but I do not know whether he obtained them.

Question 4.—Did you leave Los Angeles before they completed their negotiations?

Answer.—I left there in the commencement of the year 1843, and before they had concluded the business they were negotiating.

Question 5.—Do you know whether Micheltorena was procuring money for the use of himself and his forces from Limantour, as well as goods?

Answer.—I know that Micheltorena received money from Limantour, but I don't recollect how much.

Question 6.—At what time of the year 1843, did Governor Micheltorena arrive at Monterey?

Answer.—About the month of August, of that year, as I think, I am not positive.

Question 7.—After Governor Micheltorena arrived in Monterey in the year 1843, did you understand from the Governor aforesaid, that he had made a grant of land to Limantour in consideration of the goods and moneys that Limantour had furnished to him?

Answer.—I did not so understand from Micheltorena.

Question 8.—Have you at any time understood from Governor Micheltorena that he had granted to Limantour lands adjoining the Pueblo Yerba Buena and Mission Creek, and also in the neighborhood of the Presidio?

Answer.—I have never heard him say so.

Question 9.—Have you ever known from the archives of the Government of California of the grants of land by Governor

Micheltorena to Limantour, adjoining the Pueblo Yerba Buena and near the Presidio?

Answer.—I understand that Limantour petitioned for land, but I do not know that the grant was made. I recollect that information was asked for some lands that Limantour petitioned for. I, as Secretary, asked for this information, but of what anthority I asked this information, I do not recollect.

CROSS QUESTIONS BY THE UNITED STATES LAW AGENT.

Question 1.—When did Micheltorena first arrive in Monterey?

Answer.—I believe it was in the month of August.

Question 2.—Did you see the Governor from the time you left him at Los Angeles, until he arrived in Monterey?

Answer.—I did not see him during that time.

Question 3.—Did Micheltorena have a Secretary at Los Angeles, and if so, who was it?

Answer.—He had. It was Don Francisco Arce.

Question 4.—Do you know if Micheltorena made any grants of land at Los Angeles after you left?

Answer.—He did make many.

Question 5.—Were Expedientes kept of these grants?

Answer.—In some of those grants there were no Expedientes found in the office—in others, there were.

Question 6.—Was a registry kept of all those grants made by Micheltorena?

Answer.—In some there was no such registry.

Question 7.—Do you recollect to whom any of the grants made by Micheltorena at Los Angeles were given?

Answer.—One of them was made to Mariana Guadalupe Vallejo, of the place called Rancho National. I don't recollect any others, though there were several persons.

Question 8.—When did you see Limantour next after leaving at Los Angeles?

Answer.—I saw him frequently in Monterey, but do not recollect the time. He used to come there often with his vessel.

Question 9.—Did Limantour himself tell you that he had received from Micheltorena grants of land near San Francisco?

Answer.—I have heard him say that the Governor did attend to his petition. I did not understand Limantour to say positively that he had received a grant from Micheltorena.

(Signed) MANUEL JIMENO.

U. S. Law Agent present.

Sworn to and subscribed before me, this fifteenth day of February, 1853.

HARRY I. THORNTON,
Commissioner.

I, George Fisher, Secretary of the Board of United States Commissioners, to ascertain and settle private land claims in the State of California, hereby certify that the foregoing is a full, true and correct copy of a paper on file, among the archives of said Board, and in my care and custody, as such Secretary.

Witness my hand this twentieth day of October, A. D. 1853.

GEORGE FISHER, *Sec'y.*

The next deposition is that of Señor Don Vicente Prefecto Gomez. His testimony relates to the document found in the archives at Monterey, and is what is termed the EXPEDIENTE, consisting of Señor Limantour's proposal to purchase the two tracts of land adjoining Yerba Buena and near the Presidio,—dated January 10th, 1843; and Governor Micheltorena's decrees thereon, of the 11th of January, 1843, and 25th of February, 1843. It is the second document hereinbefore set forth on the eleventh, twelfth and thirteenth pages of this pamphlet.

San Francisco, July 6th 1853.

On this day before Commissioner Alpheus Felch, came Vicente Prefecto Gomez, a witness on the part of José Y. Limantour, claimant in case No. 548, and was duly sworn, his evidence being interpreted by the Secretary.

The United States Associate Law Agent was present.

QUESTIONS BY GENERAL WILSON, ATTORNEY FOR THE CLAIMANT.

Question 1.—What is your name, age and place of residence, and how long have you lived at your present place of residence?

Answer.—My name is Vicente Perfecto Gomez. I am about thirty years of age, and live at Monterey, where I have resided since the year that Micheltorena went to Monterey.

Question 2.—Was you with Governor Micheltorena at Los Angeles, and if so, in what capacity was you with him there?

Answer.—At Los Angeles I was with him in my individual capacity, and had no official position. I was with Micheltorena while he was at Monterey and was one of the clerks in the Governor's office, and also in the Departmental Treasury.

Question 3.—Have you ever seen any papers or documents purporting to be a petition made by Don José Y. Limantour to Don Manuel Micheltorena, Governor of California, soliciting a tract of land adjoining the Pueblo of Yerba Buena, and any order of Governor Micheltorena on said petition.

Answer.—I have seen it, and I know where the original is in the hand-writing of Mr. Limantour, and the order is in the hand-writing of Governor Micheltorena, written without the intervention of any other person.

Question 4.—When did you first see these papers?

Answer.—In the year 1843.

Question 5.—Where did you see them at that time?

Answer.—In the Secretary's office of Governor Micheltorena.

Question 6.—Since giving your answer to the former interrogatories, have you seen the said original papers again?

Answer.—I have. I saw them at Monterey on the 29th June last, in the afternoon of that day.

Question 7.—Please look at the paper here presented, marked "Exhibit A," and say if it is a true and certified copy of the original paper and document referred to in your former answer?

Answer.—It is. It is copied faithfully from the original and is in my own hand-writing. It is certified by the Recorder of the county of Monterey, at my own request.

Question 8.—You say that you first saw the original in the office of the Secretary of the Governor in 1843. Please to state the circumstances under which you first saw the original papers in the office of the Recorder of Monterey?

Auswer.—At the request of José Castro, I went to the office of the Recorder to examine the papers in reference to some property which he had at San Juan Bautista. On that examination, looking over the old archives in search of the documents required, I found these papers. After finding these papers, I put them back again into the bundle, and put the bundle back again. I went and got Dr. Olarte of Monterey, to go with me to the Recorder's office. I then, in presence of Olarte, made a copy of the documents. The Recorder afterwards compared the copy with the original most scrupulously, and then certified it. After I first found the paper I went and consulted José Abrigo, and he advised me to take a copy of it, which I did, as I have above stated, and which is the paper marked "Exhibit A."

QUESTIONS BY MR. GREENHOW, LAW AGENT.

Question 1.—When you saw the papers at the Recorder's office at Monterey, did you recollect of ever seeing it before?

Answer.—I did recollect of seeing it before. I was attached to the Secretary's office of Governor Micheltorena and recollected having seen it at that time, having known the party, Mr. Limantour, also at that time.

Question 2.—Had you any intercourse with Mr. Limantour since his last arrival in California and prior to your finding these documents?

Answer.—I had not, and if Mr. Abrigo's son had not pointed out to me Mr. Limantour at the Washington Hotel in San Francisco, I should not have known him.

Question 3.—Whose hand-writing appears on the original papers?

Answer.—No other hand-writing appears on the original papers but Mr. Limantour's and Governor Micheltorena's.

Question 4.—Did you recognize Mr. Limantour's hand-writing when you first saw it, from your recollection of it?

Answer.—I did not the hand-writing of Mr. Limantour, but I did that of Micheltorena.

Question 5.—Did you find at the Recorder's office any of the papers of which you were in search for Mr. Castro?

Answer.—I did not look for them any longer after I found those of Mr. Limantour's.

Question 6.—Was the Recorder or any one else present when you found these papers?

Answer.—The Recorder was present when I found them. He was at that time conversing with me and standing off a little at one side.

Question 7.—Did you say any thing to the Recorder about it at the moment when you found the papers?

Answer.—I did not say any thing to him; when I found the papers I put them back immediately and did not say any thing.

Question 8.—Had you examined the said papers often before?

Answer.—Since the American Government has taken possession of this country I have not been in any office. While the Mexican Government existed here I often examined these papers, but since the Americans took possession I have never examined them.

Question 9.—Before the Americans took possession where were these papers kept?

Answer.—All I can say conscientiously is, that these papers ought to have been in the office of the Secretary of State of the Departmental Government while the Mexican Government existed here, but I believe these papers have got into the office of the Justice of the Peace by some accident, during the revolution with Micheltorena, or during the American war.

(Signed) VICENTE PERFECTO GOMEZ.

Sworn and subscribed before me this sixth day of July, A. D. 1853. That portion of this deposition which precedes the 6th Question on the part of the claimant, was taken on the 23d June, 1853, and the remaining portion on the day last above written. Mr. Greenhow, the Law Agent, was present during the whole time of taking the deposition.

ALPHEUS FELCH,
Commissioner.

I, George Fisher, Secretary to the Board of Commissioners, to ascertain and settle the private land claims in California, do hereby certify that the foregoing is a full, true and correct copy of the deposition of Vicente Perfecto Gomez, filed in Case No. 548, wherein José Y. Limantour is claimant, among the archives of said Board, and in my care and custody as such Secretary.

Given under my hand at the city of San Francisco this 19th day of October, A. D. 1853.

GEO. FISHER, *Sec'y.*

The next two depositions are made and sworn to by W. E. P. Hartnell, Esq. It is entirely unnecessary to inform any body who has known the public men of California for the last quarter of a century, who he is. Every body knows him; every body respects, honors and esteems him. His word is truth—always. He is incapable of having any thing to do with falsehood or fraud in any form, and no man in his senses, would ever dream of asking W. E. P. Hartnell to verify a spurious or simulated paper or document.

The documents referred to in these depositions are as follows, viz:

Exhibit No. 1, in the 1st Deposition, is the Expediente found in the archives at Monterey, viz: Limantour's proposition to purchase the lands, with Governor Micheltorena's decrees of the 11th January and the 25th February, 1843 thereon.

Exhibit No. 2, is the original letter from Governor Micheltorena to Señor Limantour, dated on the 8th of January, 1843, written at Los Angeles.

Exhibit No. 3, is the original letter written by Manuel Jimeno to Señor Limantour dated Los Angeles, February 2d, 1843.

Exhibit No. 4, is the original deed from Governor Micheltorena to Señor Limantour, dated February 27, 1843.

Exhibit No. 1, annexed to the 2d deposition of Mr. Hartnell, is the copy of the approval by the Supreme Government of Mexico, of the grants made by Governor Micheltorena to Señor Limantour, dated at Mexico on the 7th day of October, A. D. 1843, and certified by Governor Micheltorena and Secretary Jimeno on the 25th day of December, 1843.

San Francisco, July 14, 1853.

At this day, before Commissioner Alpheus Felch, came W. E. P. Hartnell, a witness produced in behalf of José Y. Limantour, claimant in Case No. 548, and was duly sworn, his evidence being given in the English language.

The United States Law Agent and Assistant Law Agent were notified and attended.

QUESTIONS BY GEN. WILSON, ATTORNEY FOR CLAIMANT.

Question 1.—What is your name, age and place of residence?

Answer.—My name is W. E. P. Hartnell, my age fifty-five years, and I reside at Monterey in California, and I have resided at that place thirty-one years.

Question 2.—What offices did you hold under the government while Mexican authority continued in Upper California?

Answer.—I have held a great many; among others I was Inspector General of the Missions. I have been Appraiser of the Custom House, Collector of the Custom House and Regidor, and acting Alcalde. I was Director of a College two years and a half.

Question 3.—Please look at the papers here shown to you, marked at the top of the first page A. F., and also on the back as "Exhibit No. 1," and say if it is in your hand-writing; is it as you have certified, a true translation of the original papers which you refer to in your certificate written thereon?

Answer.—I have looked on it. It is in my hand-writing, and is a true translation of the paper referred to in my certificate written on it.

Question 4.—Where is the original paper now, according to the best of your knowledge and belief?

Answer.—I believe it to be in the Recorder's office at Monterey. The Recorder's name is James Gleason.

Question 5.—State what you know of said original papers, when and where you first saw it, the circumstances which called your attention to it.

Answer.—The first time I saw it was about a month or six weeks ago. The Recorder first called my attention to it. He said he had in his possession a paper respecting Mr. Limantour's claim, which he believed to be original, and desired me to look and give my opinion.

Question 6.—Have you seen José Y. Limantour write, and have you seen Don Manuel Micheltorena write, and are you acquainted with their hand-writing? If yes, state whose handwriting appears on said original paper, as well the body of the writing as the signature.

Answer.—I have seen both of them write, but Manuel Micheltorena much more frequently than Limantour. The body of the petition in said original paper and the signature thereto, are, I believe, in the hand-writing of the said Limantour; and both the body and the signature of the two Decrees in said original paper I know to be in the hand-writing of said Micheltorena.

Question 7.—From your examination of said original paper have you any doubt of the genuineness of the signatures of those persons or of the paper itself?

Answer.—I have no doubt whatever.

Question 8.—How long have you been acquainted with Don José Y. Limantour? Did you know of his being on terms of intimacy and having extensive business transactions with Don Manuel Micheltorena while he was Governor of California?

Answer.—I have known Mr. Limantour since the year 1841 or 1842. I know he was very intimate with Micheltorena, and had several business transactions with him.

Question 9.—Look at the paper here presented, marked at the top of the first page with the initials "A. F." and on the back "Exhibit No. 2," and state whether you know the hand-writing of the body of the letter and the signature thereto.

Answer.—I know them both to be in the hand-writing of

Manuel Micheltorena. I know nothing of the hand-writing of the certificate on the back of the letter.

Question 10.—Look on the paper here presented, marked at the top thereof with the initials " A. F." and on the back thereof as " Exhibit No. 3," and say whether you know the hand-writing of the body of the paper and the signature.

Answer.—They are in the hand-writing of Manuel Jimeno both the body of the letter and the signature. Manuel Jimeno was Secretary to Governor Micheltorena.

Question 11.—Look on the document here presented, marked at the top of the first page " A. F." and on the back as " Exhibit No. 4," purporting to be the original deed from Manuel Micheltorena, Governor of California, to Don José Y. Limantour, dated at Los Angeles on the twenty-seventh day of February in the year eighteen hundred and forty-three, and say whether the signature of Don Manuel Micheltorena thereto is genuine.

Answer.—It is the signature of Manuel Micheltorena.

Question 12.—Please state what you know of the manner in which the public archives were kept while the Mexican authority continued in Upper California, and during the various revolutions and disturbances which occurred during the latter part of the Mexican rule, and at the time and subsequent to the Americans taking possession.

Answer.—I knew the archives to be in several different houses in Monterey. I also knew them to be moved from Monterey to Los Angeles, and to be returned again to Monterey. After they were returned to Monterey, I knew them to be thrown into a confused heap into the Custom House. This was about the the time Americans took possession of the country. I was desired by General Kearny to have the archives removed into the Government office for the purpose of having them arranged; in consequence whereof several cart-loads were transferred into the Government office. This was the same building in which is now the Recorder's office at Monterey. I likewise knew that several documents belonging to the Government Archives have been found in the Alcalde's offices at Monterey, and many in the hands of private persons, some of which I myself have placed in the archives by order of Governor Mason, giving the parties in lieu thereof certified copies or translations of the same. Whenever any such document was restored to the archives, it was always endorsed either by the Governor, by Mr. Halleck, who was Secretary, or by myself, with the date and name of the person by whom it was deposited.

Question 13.—Did you see Mr. Limantour at Monterey, from the time the Americans took possession of the country, until since you saw the original document in the Recorder's office at that place, of which document you have made the translation, as above in this deposition stated.

Answer.—To the best of my recollection, I did not see him there during that time.

QUESTIONS BY MR. GREENHOW, ASSISTANT LAW AGENT, AND MR. HOWARD, LAW AGENT.

Question 1.—Look at the original deed marked " A. F." and " Exhibit No. 4," and say whether you consider the rubricas of Micheltorena and Manuel Castañares, affixed to the stamp on the first page to be genuine?

Answer.—The rubrica of Micheltorena is not so clearly made as his rubricas in general are, but I have no motive for supposing either of the two rubricas to be forgeries. When the Governors of California had to put their rubricas to stamped paper, there were placed before them at times some hundred sheets, and they were necessarily careless how they made their rubricas.

Question 2.—Look at the writing of the body of said document, and say whether you are acquainted with the hand-writing?

Answer.—I do not know the hand-writing.

Question 3.—When did you first see the paper above mentioned marked " A. F." and " Exhibit No. 4."

Answer.—I saw it to-day for the first time.

Question 4.—What has been your opportunity of knowing about the existence of grants of land in California?

Answer.—During the whole time of the existence of the military government here, under the United States, I had the situation of Government Translator, and I made an Index of all the California land titles which I could find. I had nothing to do with the Government Archives under the Mexican Government.

Question 5.—When did you first hear of the existence of the above described grant to Mr. Limantour ?

Answer.—I first heard of it lately by public rumor, since Mr. Limantour came to San Francisco to make his claim.

Question 6.—How many times have you seen Mr. Limantour in California since 1841, and when?

Answer.—I cannot recollect dates well. I saw him in Monterey frequently between 1841 and 1845 or 1846.

Question 4.—Has Mr. Limantour ever had any occupancy or actual possession of the land described in the grant?

Answer.—Not to my knowledge.

Question 8.—Where has Mr. Limantour had his residence from the time you first knew him until the present time?

Answer.—I never knew that he had any fixed residence in California. I knew him to come back and forth to Monterey in a vessel. His occupation was that of a merchant. He came as Captain and owner of the vessel and cargo.

(Signed) W. E. P. HARTNELL.

Sworn and signed before me, this fourteenth day of July, A. D. 1853, at San Francisco, and I have annexed hereto the Exhibit, presented at the time of taking this deposition, and referred to therein. The Law Agent objected to the third, fourth, fifth, sixth and seventh interrogatories propounded by the claimant's attorney, and the answers thereto; and the same were received subject to such objection.

(Signed) ALPHEUS FELCH, *Commissioner.*

I, George Fisher, Secretary to the Board of Commissioners to ascertain and settle the private land claims in California, do hereby certify that the foregoing is a true and correct copy of the deposition of W. E. P. Hartnell, filed in case No. 548, (wherein José Y. Limantour is claimant,) among the archives of said Board, and in my care and custody, as such Secretary.

Given under my hand, at the city of San Francisco, this eighteenth day of October, A. D. 1853.

(Signed) GEO. FISHER.

SECOND DEPOSITION OF MR. HARTNELL.

Office of the Board of U. S. Commissioners, &c.

This day, before Commissioner Alpheus Felch, came Wm. E. P. Hartnell, a witness in behalf of claimant, José Y. Limantour, No. 548, who after being duly sworn, deposed as follows:

QUESTIONS BY GEN. JAMES WILSON, ATTORNEY FOR CLAIMANT.

Question 1.—What is your name, age and place of residence?

Answer.—My name is William E. P. Hartnell, my age fifty-five years, and I reside at Monterey in California.

Question 2.—Look on the document now here presented, marked "Exhibit No. 1," with the initials "A. F." annexed to this deposition, and purporting to be a copy of an order from the General Government of Mexico, approving of the grant of land by Governor Micheltorena to Don José Y. Limantour in the Californias, and also authorizing said Governor Micheltorena to make further grants to said Limantour, bearing date at Mexico on the 7th day of October, A. D. 1843, and state whether the signatures of Manuel Micheltorena and Manuel Jimeno thereto are genuine signatures, and whether you recognize the hand-writing of the body of said paper, and if so, state whose writing you believe it to be.

Answer.—I have examined said document; the signatures of Manuel Micheltorena and of Manuel Jimeno appearing thereto, are the genuine signatures of Manuel Micheltorena and Manuel Jimeno, respectively. I have frequently seen both of them write, and have no doubt at all of the genuineness of those signatures. As to the hand-writing of the body of the document, I am not positive whose it is, but I believe it to be in the hand-writing of Francisco Arce.

QUESTION BY MR. GREENHOW, ASSOCIATE LAW AGENT.

Question 1.—When did you first see the document abovementioned?

Answer.—I do not recollect ever having seen it before yesterday, nor did I ever hear of it before.

(Signed) W. E. P. HARTNELL.

Subscribed and sworn to before me at San Francisco, this 29th September, 1853.

(Signed) ALPHEUS FELCH,
Commissioner.

September 29, 1853.

It is agreed that the foregoing deposition and the document proved hereby, may be used in cases No. 549 and 715.

(Signed) J. WILSON.
(Signed) ROBERT GREENHOW,
Associate Law Agent.

I, George Fisher, Secretary to the Board of Commissioners, to ascertain and settle the private land claims in California, do hereby certify that the foregoing is a full, correct and true copy of the deposition of W. E. P. Hartnell, filed in case No. 548, (wherein José Y. Limantour is claimant,) among the archives of said Board in my care and custody as such Secretary.

Given under my hand this 17th day of October at San Francisco, A. D. 1853.

GEORGE FISHER, *Sec'y.*

DEPOSITION OF WM. A. RICHARDSON.

Office of Commissioners of Land Claims in California.

This day before Commissioner Alpheus Felch, came William A. Richardson, a witness in behalf of claimant, José Y. Limantour, case No. 548, who after being duly sworn, deposed as follows:

QUESTIONS BY GEN. WILSON, ATTORNEY FOR CLAIMANT.

Question 1.—What is your name, age and place of residence?

Answer.—My name is William A. Richardson, my age fifty-eight years, and I reside at Saucelito in Marin County in the State of California. I have resided in California thirty-one years.

Question 2.—What was your profession or business in early life?

Answer.—A sea-faring life. I came to California as first officer of a vessel.

Question 3.—What offices have you held in California?

Answer.—I never held any public office until 1835 when I was appointed Captain of the Port of San Francisco.

Question 4.—What year was it when you arrived in California, and at what particular place did you reside during the six or seven years next after your arrival?

Answer.—I arrived on the 2d day of August, A. D. 1822, and lived from that time until the year 1829 at the Presidio of San Francisco.

Question 5.—Was you married during that time, and if so, to whom?

Answer.—I was married on the 12th day of May, A. D. 1825, to the eldest daughter of Don Ignacio Martinez, the then Commandant and Commissary of the Presidio. He was in full command there at that time.

Question 6.—What was your employment or business while you resided at the Presidio of San Francisco from 1822 to 1829?

Answer.—I was employed generally in the Bay of San Francisco with launches, freighting for the Government and assisting the Commandante as Interpreter in the entering of foreign vessels into port. I also acted as pilot to such vessels. I also cultivated some small pieces of land in the neighborhood. During that time, I was once down the coast to San Diego with a small vessel, belonging to William Hartnell of Monterey.

Question 7. From 1822 to 1829 where was the anchorage for vessels after coming through the "Golden Gate," into the Bay of San Francisco?

Answer.—For merchant vessels, it was at the eastward of the fort, about three cables' length from the fort, in a small bay opposite the Presidio. They anchored at that place up to December, 1824. Whale ships used to go to Saucelito to anchor for the benefit of fresh water. From December, 1824, the merchant vessels came to anchor at the Yerba Buena Cove.

Question 8.—What was the reason of removing that anchorage?

Answer.—On account of the strong ebb tide, occasioned by the heavy freshet from the rivers, it being a very remarkable season for heavy rains. The old anchorage, by reason of this, was a dangerous one. The heavy freshet washed away the beach greatly and part of the land which the fort stands upon, and the vessels were very near being taken to sea.

Question 9.—Was there any communication made to the Governor of California in relation to the removal of the anchorage? If so, at what time, and by whose order?

Answer.—In 1828 orders came from General Escheudea, then Governor of California, to the Commandante of the Presidio, to obligate vessels to anchor at the old anchorage, at which the Commandante requested me to write a communication to the Governor, stating the impossibility of vessels anchoring at the old anchorage, as formerly. I made the communication as directed; in answer to which the Governor sent orders to the Commandante to permit vessels to anchor at the anchorage of Yerba Buena, and to be very particular in putting a guard on board of each vessel, and not to allow any private individual to locate on any pretence whatever in that vicinity; and from that time it was always considered the general anchorage for the Port of San Francisco.

Question 10.—Where did you go to reside after leaving the Presidio of San Francisco, in 1829?

Answer.—I went to the Mission of San Gabriel, near to the Pueblo of Los Angeles, where I resided until the early part of the year 1835.

Question 11.—What was your business at San Gabriel?

Answer.—I was employed superintending the building of a small vessel belonging to the Padres of the Mission, and I also sailed along the coast in the same vessel and also in other vessels belonging to the Mission. I went during that time a voyage to Callao, on the coast of Peru, and two voyages to

Mazatlan and San Blas. The vessel above mentioned was built in the creek on the Bay of San Pedro, the seaport of Los Angeles, and twelve or thirteen leagues from the Mission of San Gabriel. My wife and family during that time resided at the Mission of San Gabriel.

Question 12.—Was you during the time mentioned in your answer to the tenth interrogatory, often back and forth from the Bay of San Pedro to the Bay of San Francisco?

Answer.—I was.

Question 13.—When did you leave San Gabriel, and where did you then go to reside?

Answer.—I left there in May, 1835, and went to reside at the Yerba Buena.

Question 14.—State the circumstances under which you came to the Yerba Buena; upon whose application, and the object of your coming to Yerba Buena.

Answer—By the request of General Figueroa, who was at the Mission of San Gabriel in May, 1835. He requested me to come to Yerba Buena, to establish me as Captain of the Port of San Francisco, as he had seen a communication written by me in 1828, respecting the anchorage at Yerba Buena, and he wished to lay off a small settlement for the convenience of public offices at the anchorage of Yerba Buena.

Mr. Howard, Law Agent, objects to the above answer as to the contents of writings, without the production and proofs.

Question 15.—Did you comply with Gov. Figueroa's request in leaving San Gabriel and coming to Yerba Buena?

Answer.—I did.

Question 16.—Please state the manner you came, and in whose company.

Answer.—I came by land with my family, in company wirh General Figueroa. Sometimes he was a little ahead and sometimes I was, while we were on the way, until we got to the Mission of Solidad. At that place he left me and took the road to Monterey.

Question 17.—State what orders General Figueroa gave you in relation to founding a settlement at Yerba Buena, for the convenience of the anchorage.

Answer.—He gave me verbal orders to come to the Yerba Buena and await his orders, as he had to order a meeting of the Departmental Assembly to lay off the small village at Yerba Buena.

Mr. Howard objects to the testimony, and to any evidence by parol of orders from Figueroa to the witness, and of orders from the Departmental Assembly to Figueroa.

Question 18.—Did you come to Yerba Buena in pursuance of the directions of the Governor?

Answer.—I did.

Mr. Howard objects to the question as a leading one, and to the answer thereto.

Question 19.—When did you arrive at Yerba Buena?

Answer.—About the month of June the same year.

Question 20.—Where did you next hear from Mr. Figueroa?

Answer.—In the month of August following; not directly from him, but from one of the officers belonging to his Staff, Lieutenant Navareta.

Question 21.—What communication did he make to you?

Answer.—He ordered me immediately to go to Monterey, as the General wished to see me very much. It was a written order.

Mr. Howard objects to all testimony on the subject, without the production of the written order.

Question 22.—Did you go to Monterey, immediately after that?

Answer.—I went in about eighteen hours after I received the order.

Question 23.—Did you or did you not see Governor Figueroa when you arrived there?

Answer.—I did not see him alive; I saw him dead.

Question 24.—Who succeeded Governor Figueroa in the office of Governor after his death?

Answer.—Don José Castro. He was the first person I saw on my arrival.

Question 25.—Had you any conversation with Don José Castro at that time, at Monterey, in relation to your business at that place? If so, state what.

Mr. Howard objects to all evidence of conversation with Don José Castro.

Answer.—I did. He is still living. He first mentioned to me that General Figueroa was very anxious to see me, as he had made arrangements with the Assembly about laying off a small village at Yerba Buena; as he particularly wished for me to get a lot for my habitation there, where he wished to establish me as Captain of the Port of San Francisco. At the same time Castro told me that I could not locate within two hundred varas of the beach for a private residence, as that was reserved for public offices. He was then Political Governor, but could not attend to any business until after the ceremonies of the funeral of General Figueroa were over, and then he would despatch me. I told him my family were entirely alone in a tent here at Yerba Buena, and wished him to permit me to return immediately to my family, until he had time to attend to laying off the town or village. He told me that I could return immediately, and that he would send up orders to the Civil Authority to lay off the village at Yerba Buena, and requested me to assist the Civil Authorities in laying it off, which I told him I would do.

Question 26.—Was the Departmental Assembly, or some of the members of it, at that time, in attendance at Monterey?

Answer.—They were there, but I do not know whether they were doing any particular business just at that moment. I came away directly.

Question 27.—When did you next hear from Monterey, and from whom?

Answer.—The first time I next heard from Monterey, was from Don Francisco De Haro, Alcalde, then residing at the Mission of San Francisco de Assis.

Question 28.—What did De Haro communicate to you, in regard to the establishment of the small village of Yerba Buena?

Answer.—He had a letter from the Political Government directing him to lay off a small village at Yerba Buena, and to give me the first one hundred vara lot after the village was laid off. But he could not then do it, because he had not the Ayuntamiento collected together. They were then scattered about. He requested me to be present when he laid it off, and required my assistance, and said he would let me know when he was ready to do it. I was then living in my tent on the hill, at the edge of the woods, within the limits of Yerba Buena. About two days after this, he collected the Ayuntamiento and came with them to my tent, and he told me he was then ready to lay off the village, and required my assistance in so doing. He told me his first orders were to reserve two hundred varas all along the beach opposite the anchorage, for Government offices.

Mr. Howard objects to the testimony in answer to interrogatory 28.

Question 29.—Please to state what the Ayuntamiento did at that time?

Answer.—They measured off two hundred "varas" from the beach, in a south-west direction, and then told me I could select some place out of that limit on the clear land as represented for my one hundred "vara" lot. I told them I wished to go a little higher up to the south-west from the foot of the hill. They then measured off another one hundred vara in the same direction. I told them I wished to locate my lot somewhere in that limit from the beach. The magistrate, Don Francisco De Haro, told me in presence of the Ayuntamiento, that he must have a starting point from the south-east, so that he could fix the lot. He then appointed the first sand hill to the south-east from where we were standing, as the south-east boundary. He than went to that first sand hill with the Ayuntamiento and I accompanied them; and he pointed the direction in which the streets must lay. He then told me that I could take the first one hundred vara lot from the starting point, or any one hundred vara lot in the direction to the north-west. He commenced measuring and measured off the first one hundred vara lots, and in measuring the fourth one, I wished to take one half of the fourth and one-half of the fifth lot, as these parts were just where it come on the cleared part of the plain, and left it more open. He told me he could not give me a half lot, but I might take any one complete one hundred vara lot any where in that direction. I selected the fifth one hundred vara lot from the starting point. He measured off more in that direction, but declared all the land in direction on that line to the waters of the bay on the north-west boundary for the small settlement of "Yerba Buena," and at the same time laid off the street in that same direction which he called "Calle de la Fundacion." and measured two hundred varas more from the south-west side of my lot to the south-west, running into the hills, which he called the south-west boundary—(being parallel to the street above named) of the small village of Yerba Buena. The south-east limits were three hundred varas from said street in a south-west direction from the commencement of the street, and from the same street in a north-east direction along the sand hill into the bay. The borders of the water from that point all around towards the north-west to what is now called the North Beach at the point where the south-west boundary came to the bay, formed the other boundary. The first two hundred varas measured off on the beach were reserved for government purposes.

(Mr. Howard objects to this question, as asking parole evidence of matters in writing, and to the answer for the same reason, and because it is irrelevant, hearsay, and statements of conversations between third parties, and in other respects illegal and incompetent.)

Question 30.—Please to state how far the south-eastern limit of the small settlement of Yerba Buena was from the south line of your one hundred vara lot.

Answer.—Four hundred varas to the south-east limits.

(Mr. Howard objects to this question because it assumes a fact, and also to the answer thereto.)

Question 31.—Did you make a plan or map, showing the limits of the small settlement of Yerba Buena. If yes, by whose direction?

Answer.—I did, by order of the magistrate, Don Francisco De Haro.

Question 32.—Look at the paper now here shown to you, marked "Exhibit No. 2," with the initials "A. F." annexed to your deposition given in case No. 280, and say whether it is the map made by you by order of De Haro, as above stated.

Answer.—It is the same.

Question 33.—Did you immediately after make a copy of the map. If so, by whose order and for what purpose?

Answer.—I made a copy immediately after by order of the

Magistrate, Don Francisco De Haro, to send to the Political Government.

Question 34.—Look at the document, now here shown to you, marked "Exhibit No. 1," with the initials "A. F." annexed to your deposition in Case No. 280, and say whether it is a letter which you received from José Castro, acting Governor of California, under date of the 20th October, A. D. 1835?

Answer.—It is. I received it about the latter part of October, 1835. It was delivered to me by Don Francisco De Haro, the Magistrate.

Question 35.—Are you acquainted with the hand-writing of José Castro? Have you seen him write?—if yea, is his signature to that letter his genuine signature?

Answer.—I have seen him write and am acquainted with his hand-writing. The signature to the letter is his genuine signature.

Question 36.—How long did you continue to live in the little settlement of Yerba Buena, after returning here in 1835?

Answer.—I lived here until the year 1841, the early part, when I went to reside on my farm at Saucelito, where I now live.

Question 37.—During that period of time were there any grants of land made in the settlement of Yerba Buena outside of the limits you have above stated, to your knowledge?

Answer.—Previous to the year 1841 there were no grants made outside those limits. (Mr. Howard objects to this question and answer, the grant not being produced.)

Question 38.—Did you continue to hold after moving to your farm, the office of Captain of the Port of San Francisco?

Answer.—I did. I held it until the latter part of the year 1844.

Question 39.—Did you ever know of any grants of land for settlement in the immediate neighborhood of Yerba Buena, outside of the limits above described, until after the Americans took possession.

Answer.—Not any.

(Mr. Howard objects to the question and answer.)

Question 40.—Are you acquainted with José Y. Limantour, and when and where did you first become acquainted with him?

Answer.—I am acquainted with him. I first became acquainted with him at my house, at the Saucelito farm, on the 9th day of November, in the year 1841.

Question 41.—How long did Mr. Limantour remain in this neighborhood, subsequent to that time?

Answer.—He remained here nearly a twelve-month. His vessel was cast away on the Point de Reyes. He hired a vessel and went to the point, to bring down the part of the cargo which was saved, and brought it down and put it in an old adobe house here, which formerly belonged to me, where he remained with it most of the time. He finally left here in a small schooner, which he bought of General Vallejo, about October, A. D. 1842.

Question 42.—Have you since that time had any further communication with the Mexican authorities about the limits of Yerba Buena, and the vacant lands in the neighborhood of it?—if yea, please to produce any correspondence or communication you have had on the subject.

Answer.—I have had a communication,—that which I now produce is it.

Witness here produces a paper purporting to be signed Manuel Jimeno and dated 14th January, 1843, and written in the Spanish Language, which paper is annexed to this deposition and marked " Exhibit No. 1., with the initials " A. F."

Question 43.—Are you acquainted with the hand-writing of Don Manuel Jimeno,—have you seen him write and is his signature to the letter that you now produce, his genuine signature?

Answer.—I am acquainted with his hand-writing, and have seen him,—this is his signature.

Question 44.—State by whose hand you received that letter?

Answer.—By that of the former Magistrate of San Francisco, Don Francisco De Haro.

Question 45.—About what time?

Answer.—About the latter part of January, A. D. 1843.

Question 46.—Did Francisco De Haro show to you at the same time a communication which he had received from the Government upon the same subject?

Answer.—He showed me a communication on the same subject addressed to him.

(Mr. Greenhow objects to this question and answer, the communication not being produced.)

Question 47.—Did you and Mr. De Haro answer the said communications, and did you accompany the answer with any map or plan? and if so, what?

Answer.—I answered the letter and sent a copy of the original plan which is here presented, marked "Exhibit No. 2," with the initials "A. F." and filed with my Deposition in Case No. 280.

(Mr. Howard objects to this question and answer.)

Question 48.—To whom did you send a copy of your map, as stated in your last answer?

Answer.—To General Micheltorena.

Question 49.—Did you write a letter in reply to the one addressed by you from Jimeno, annexed to this Deposition, marked "Exhibit No. 1," with the initials "A. F.," and if so, to whom did you address your reply?

Answer.—I answered the letter, and addressed it to General Micheltorena.

Question 50.—Did you see Mr. Limantour here in the harbor of San Francisco, subsequent to the fall of 1842? If so, state when.

Answer.—I saw him here in 1844, and again in 1847.

Question 51.—Have you had any other correspondence with any of the Mexican authorities, civil or military, in regard to vacant lands at the Yerba Buena? If so, please to produce it.

Answer.—I have. The paper now produced by me is a letter from General Vallejo. [The letter here produced by the witness purports to be a letter signed by M. G. Vallejo, dated Sonoma, Nov. 7, 1843, addressed to the witness and written in the Spanish language. The same is annexed to this deposition and marked "Exhibit No. 2," with the initials "A. F."]

Question 52.—Are you acquainted with General Vallejo's hand-writing? Have you seen him write? If so, state whether this letter and the signature are in his own hand-writing.

Answer.—I am acquainted with his hand-writing, and have seen him write, and this letter is in his own hand-writing, and so is the signature.

QUESTIONS BY MR. GREENHOW, ASSISTANT LAW AGENT.

Question 1.—Does the street, called by you Calle de la Fundacion, correspond in direction with any street in the city of San Francisco, at present.

Answer.—It does not correspond in location with any street. The new streets laid out in the south-east part of the town were nearly in the same direction.

Question 2.—Describe, as nearly as you can, with reference to the present streets in San Francisco, the position of the first sand hill, which you say formed the limit of the town of Yerba Buena on the south-east, agreeably to your plan.

Answer.—The first sand hill was between the streets now called California street and Pine street, and it was nearest to Pine street.

Question 3.—State the position, as nearly as you can, of the starting point of the Calle de la Fundacion at the sand-hills from which the lots were measured.

Answer.—That starting point is now the present corner of Pine and Kearny streets, but not quite so far south as Pine street. I could tell the place within a vara by going on the ground and measuring the distance from my lot.

Question 4.—What was the course or direction of the sand hills from that point towards the bay.

Answer.—About north-east.

Question 5.—When was the direction or course of the streets changed from the course laid down by you on the maps?

Answer.—They were first changed in 1839 by a survey made by Captain Vioget. They were surveyed at different times afterwards, but I did not take any particular notice how they were laid off after that.

Question 6.—Did you know or ever hear of any decree or order of the Territorial Deputation or Departmental Assembly adopting the plan and limits recommended by you for the town of Yerba Buena, or any other plan or limits?

Answer.—I never saw or heard of any except that which I have presented.

Question 7.—What was the most southern lot occupied by any individual in Yerba Buena in July, 1846?

Answer.—I do not recollect any further south than that occupied by John Fuller. That lot was located at the north of the

Calle de la Fundacion, near what is now Pine street, and a little to the northward and westward of that street.

QUESTIONS BY MR. HOWARD, LAW AGENT.

Question 1.—When did you first hear of the Limantour grant?

Answer.—In the early part of 1843 I first heard of this application for a grant.

Question 2.—When did Mr. Limantour first settle upon or occupy any portion of the grant?

Answer.—I never saw him occupy or settle on the land. He never built a house on it, nor occupied it, nor built any fence on it, as I ever saw.

Question 3.—Where does Micheltorena live, and where has he lived since July, 1846?

Answer.—I do not know. I think he lives about Mexico in some place. In 1852 he was living very near the city of Mexico.

Question 4.—Do you know whether Micheltorena has any interest in this Limantour grant?

Answer.—Not any that I know of, I never heard it mentioned.

Question 5.—Did you ever have any conversation with Limantour touching an interest of Micheltorena in this grant?

Answer.—No conversation whatever.

Question 6.—Have you never seen a draft drawn by Micheltorena, or in favor of Micheltorena, or by or in favor of Limantour, for a purchase or sale of a grant of land in California, and if so, what grant?

Answer.—I have never seen any.

Question 7.—Where has Limantour resided since 1846?

Answer.—I do not know where his residence is. In 1852 I saw him in his establishment in the city of Mexico.

Question 8.—What business was he engaged in at that time?

Answer.—He had a very large store of arms, and he represented to me that he was supplying the government with arms and ammunition. I saw him at his store.

Question 9.—Did he inform you how many years he had been supplying the Mexican Government with arms?

Answer.—He did not inform me exactly the time, but he said he had always been supplying them.

Question 10.—Do you know how many, or what years he had supplied them?

Answer.—I do not. I know that in the early part of the year 1844 he brought on arms to California for the Mexican Government.

Question 11.—Do you know any thing about his vessel being detained, or being himself arrested by an officer of the United States navy or army, on a charge of supplying the Mexican Government with arms in the year 1845, 1846, 1847, or 1848?

Answer.—I heard of his being arrested by an American vessel of war on the coast of California, during the war of 1846 or 1847.

Question 12.—What did Limantour say to you in regard to this arrest?

Answer.—He said that he had every satisfaction from it that he required. I think he said he got satisfaction from the United States Charge D'Affairs in Mexico.

Question 13.—During what year did he get this satisfaction?

Answer.—I do not know, he did not inform me.

Question 14.—What did he tell you about claiming the protection of the French Government as a citizen of France?

Answer.—He never told me any thing about the French Government in respect to protection.

Question 15.—During what years since 1843 have you seen Mr. Limantour in California?

Answer.—I saw him here in 1844 and in 1847, and again in the last part of 1852, and in the early part of the present year.

Question 16.—At whose house did you see Mr. Limantour in the city of Mexico?

Answer.—I saw him at his own store, and at his dwelling-house.

Question 17.—What conversation occurred at that time in relation to this grant of land?

Answer.—The first thing he asked me was, how the Commissioners were getting on, and then he said, "My lands are at the Yerba Buena, are they occupying them?" I told him they were occupying them, and that he ought to be there to defend his lands, or send on his documents, as the Commissioners were in session. He said that his papers had no conditions at all, and that he could present them at any time when the Board was sitting. He said his documents were all substantiated by the proof of signatures by the United States Consul in the city of Mexico, or the United States Minister, and that he heard the Commissioners were very particular about it. He showed me his documents and opened them in his hands, but I did not examine them. He said his documents were all right, he was satisfied with them, though he heard the Commissioners were very particular in respect to signatures. I advised him to come on immediately with them, but he said he could not come then, but must wait until a packet arrived from France.

Question 18.—Did you see Abrigo in the city of Mexico in 1852, and if so, at whose house?

Answer.—I never saw him in Mexico.

Question 19.—Did you see Micheltorena and Limantour together at that time in the city of Mexico?

Answer.—I never saw Micheltorena in Mexico.

Question 20.—Did you borrow any money of Limantour in Mexico?

Answer.—I borrowed no money of him. I paid him the amount I owed him, five thousand dollars.

Question 21.—How much money did you take to Mexico with you?

Answer.—I took five hundred dollars, given to me by G. B. Post & Co. of San Francisco, and gave my note for three hundred more, which I borrowed in Acapulco of Don Marcus Batani, which my agent, W. P. Davis, paid after in San Francisco. It was paid two or three months after my return.

Question 22.—How long before you went to Mexico had you owed five thousand dollars to Limantour?

Answer.—From the latter part of 1841 to the latter part of 1842, I had dealings with him, and was indebted to him in that sum.

Question 23.—Did you pay him that amount in the city of Mexico?

Answer.—I gave him my note of hand payable in San Francisco.

Question 24.—To whom was that note payable?

Answer.—To Bolton, Barron & Co. of San Francisco.

Question 25.—Did you pay the note to Bolton, Barron & Co.?

Answer.—I did not pay it to them. I was not here when it became due.

Question 26.—To whom and when did you pay it?

Answer.—I paid it to Limantour. I cannot tell the exact time, but it was some five or six months ago that I paid the last. I paid two thousand dollars first, and afterwards three thousand.

Question 27.—How did you pay it?

Answer.—In hard dollars, with my own hand.

Question 28.—Where did you pay it?

Answer.—The first two thousand dollars in my own house, and the last three thousand in the house of my son-in-law, Manuel Forres, which is near my own habitation.

Question 29.—Was any person present when you paid the first two thousand dollars?

Answer.—My wife was present. I do not recollect any body else, except Indian servants.

Question 30.—Who was present at the last payment?

Answer.—No one was present when I paid him the money. It was the office of my son-in-law. My daughter was in and out at different times, but whether she took any notice I cannot say.

Question 31.—Was the note endorsed by Bolton, Barron & Co.?

Answer.—I think not. I think it was endorsed by some person, I cannot recollect the name.

Question 32.—Did Bolton, Barron & Co. authorize you to draw on them for five thousand dollars, or for any sum?

Answer.—They did not.

Question 33.—How came you to make your note payable to Bolton, Barron & Co.?

Answer.—I gave the note to Limantour, he must have passed it to Bolton, Barron & Co. I did not know any thing about it until I got a note from them that it was due.

Question 34.—When Limantour showed you his grant in Mexico, did you examine his papers in relation to it?

Answer.—I took no notice of the papers. They were first shown to me in his hand, and I did not examine any thing.

Question 35.—Did you examine a map attached to the grant?

Answer.—I examined nothing belonging to the papers.

Question 36.—When did you reach the city of Mexico?

Answer.—I left San Francisco on the first day of June, 1852, and got back on the twenty-ninth day of July in the same year, and spent about eleven days in the city of Mexico. I was about eight days in going to Acapulco, and nine or ten from that place to the city of Mexico. I was two or three days in Acapulco. I was about seven days in returning from the city of Mexico to Acapulco, and spent eight or nine days in that place waiting for a steamboat, and we were about eleven days coming to San Francisco.

Question 37.—During what portion of the time spent by you in the city of Mexico was it, that you had this conversation with Limantour about his papers?

It was the first day that I arrived. This was the only conversation on that subject. I had other conversations with him on other subjects.

Question 38.—Who was present when Mr. Limantour showed you these papers?

Answer.—No one but him and me.

Question 39.—Had you ever seen these papers before?

Answer.—I never had.

Question 40.—Did Mr. Limantour invite you to look at those papers, or could you have examined them if you had chosen?

Answer.—He did not invite me to look at them, but he opened them and put them before me, and I could have examined them if I had wished; but I did not.

Question 41.—Did Mr. Limantour give you a description of the lands of which these papers purported to be a grant?

Answer.—He gave me no description more than I mentioned before. He said they were his papers of the Yerba Buena.

Question 42.—Did you have any knowledge at that time of the land of which these papers purported to be a grant?

Answer.—From information I had knowledge, but never saw this grant until that time.

Question 43.—Of what quantity of land had you information that he had a grant?

Answer.—The land from the South East limits of the village of Yerba Buena to the Mission, including Rincon Point, but I don't know what other limits.

Question 44.—Who gave you that information?

Answer.—The first persons who mentioned it to me, were Robert Ridley and Don Francisco De Haro.

Question 45.—When?

Answer.—De Haro, a very short time after Micheltorena had written to him and me for information respecting the unoccupied land in Yerba Buena, told me that Limantour had got a grant for the land. Ridley spoke to me about it in 1844, and again in 1847. Ridley often officiated for me as Captain of the Port when I was away, and Limantour was here in 1844, and also in 1847, and Ridley told me he was knocking up a great fuss about his lands. He told me this in 1844 and also in 1847.

Question 46.—Where is De Haro?

Answer.—He is dead.

Question 47.—Where is Ridley?

Answer.—He is dead likewise.

Question 48.—What was the object of your visit to Mexico?

Answer.—Private business. I heard from my son-in-law, that the law was going to be enforced not to allow any grants of land within ten leagues of the sea shore, and I said if that was so, my Saucelito property would be lost, but as to the grant which I had from the Mexican Government, for services rendered, lying on the sea coast likewise, I would go to Mexico to see if I could get from that government another grant in Lower California, in stead of it. I started for Mexico the next morning after my son-in-law told me.

(Signed,) WILLIAM A. RICHARDSON.

The signatures with which this deposition closes, from and including the 20th question, were propounded by Mr. Peachy for Mr. Howard, and without objection. Subscribed and sworn to before me at San Francisco, this 5th day of Sept., A. D. 1853.
(Signed,) ALPHEUS FELCH, *Comm'r.*

I, George Fisher, Secretary of the Board of U. S. Commissioners, to ascertain and settle the private Land Claims in the State of California, hereby certify the foregoing to be a full, true and carrect copy of a paper on file among the archives of said Board, and in my care and custody as such Secretary.
GEO. FISHER, *Secretary.*

Connected with the Deposition of Captain Richardson, is a letter written to him by Gen. M. G. Vallejo relating to a grant of land at Yerba Buena, and also referring to the fact that Señor Limantour was aiding Gen. Micheltorena with funds, and soliciting lands from the Governor at Yerba Buena. The reader will please to note particularly the date of the letter, (*November* 7, 1843,) and the fact that the Señor Castañares, for whom he solicits the information from Richardson in regard to the lands at Yerba Buena, is the same who was connected with the Government of California as Collector of the Customs at the Maratime Custom House at Monterey, the capitol of the Department.

I would also ask the attention of the reader to another document which is on file in case No. 280, on the Docket of the Honorable the Board of Land Commissioners, and annexed to the Deposition of Wm. A. Richardson, taken in that case.—Case No. 280 is the petition of the City of San Francisco for certain lands. The deposition of Richardson was taken by the Law Agent of the United States, against the claim of the city, and the document I refer to, and which is annexed to his deposition in that case, is the letter of Señor Don José Castro, Governor *ad interim*, dated at Monterey, Oct. 20th, 1835, and addressed to Captain Richardson. It is inserted here for reference and to show the relevancy of parts of Captain Richardson's testimony.

GENERAL VALLEJO'S LETTER.

Sonoma, Nov. 7th, 1843.

Señor Don Guillermo Richardson:—Esteemed Sponsor, (compadre); Señor Don Manuel Castañares writes to me requesting to inform him about the vacant lands existing in the "Yerba Buena," and particularly on the sea-beach; as Señor Don Manuel seems to be a little jealous of the extensive grants which Señor Don Manuel Micheltorena has made to other individuals, as you know Señor Castañares wishes to enjoy also the same rights that the foreigners do. You know that he has held several offices, and that to-day he is the Collector of the Maratime Custom House, and he wishes also to get something, as all the rest. He solicits to obtain a tract of a thousand "varas" long by two hundred "varas" wide, and besides fifty "varas" in the sea, the whole length to make a wharf.

It seems to me, sponsor, that this Señor works to have the Custom House brought to San Francisco—let us see. You know that always it was my project, that the Custom House should be removed to San Francisco, and I believe that my riend Castañares knows something, for he came from Mexico full of the projects of Bandini, Hisar, Pardrés and Aranjo, who, had they not fallen into disfavor, would have consummated said removal. However, we shall see how the thing goes. I for my part, don't think that the Custom House may remain in Monterey. Whether the lands be given to foreigners or natives, matters us little, after the object being obtained. But it would be far better that he should have such land in preference to other strangers as I came to understand.

I send you also the letter of Don Francisco Sanchez, about the subject, to whom I have written already as Alcaldé of the place, to state which are the vacant lands of such dimensions as you will see, he indicates to me the boundaries of a devil of a tract. I think that you know better of the grants made, so I hope you will have the goodness to give me your opinion, that I may write to Señor Don Manuel Castañares, about his solicitation to water privileges, which he is going to ask the Governor, following the example of Leese, Salvador, and the Russians,

&c.; also that you may give me an idea about the land, with a delineation of the sea-beach, although I think it be a foolishness to ask for since it is worth but little, it is deep bottom, there are so large rocks, that Capt. Steel on one or two occasions, got his vessel struck, while I was on board, and besides you know that at the very place there lay the wreck of the Spanish Brig of War, "San Carlos," which was cast away, I think, in 1812.

I believe that your statement about the subject will be of much weight in favor of Señor Castañares, and will be considered the best report as may be given, since by your practical knowledge as a resident of the place, you have been Captain of the Port many years, and this is of much consideration to the subject in question.

Also, I understand, that our friend, the well-known Limantour, who you will recollect wrecked on "Punta de Reyes," and whom we helped to save a part of his goods, with thousand troubles, has furnished large sums to General Micheltorena, and that if he does not intrigue, at least he endeavors to obtain some grants in that and other places, taking advantage of the poverty and scarcity of the revenue of the Treasury of the Department.

Finally, we should endeavor as a first point in view, to get and bring the Custom House to San Francisco—since from that, it will not only result a good to the country, but to ourselves particularly. I have sent the exposition made to the Government, printed here officially; and this, it seems to me, has opened the eyes of Señor Castañares, who has no property in Monterey. Besides, you know, that I have many friends in Mexico, and particularly the friendship of the President of the Republic, to whom, both privately and officially, I have written extensively; and according to my political and financial barometer at the Capitol, Señor Virmond, the thing takes a very favorable aspect.

Señor Castañares has told me in private conversation, that he thought of establishing a rancho here, and I offered to give him cattle, horses and Indians, in this way calculating upon his friendship, as we shall predispose him in our favor. The General himself is well disposed to foster the advancement of the country. I can operate, as you know, so efficaciously that almost I am able to assure you that the thing will be done.

This companion and friend wishes you prosperty.

(Signed) M. G. VALLEJO.

I, George Fisher, Secretary of the Board of the United States Commissioners to ascertain and settle private land claims in the State of California, certify the foregoing to be a translation of a Spanish document on file in this office, in case No. 548, José Y. Limantour, and under my charge and custody, as such Secretary.

Witness my hand this 22nd day of September, 1853.

(Signed) GEORGE FISHER, *Sec'y.*

GOVERNOR CASTRO'S LETTER.

Political Government ad Interim of the
Upper California.

This Government conforming with the good desire of my predecessor, Señor Don José Figuerao, regarding the settling of a town in the place called "la Yerba Buena," and attending likewise to the statement made by you in the name of the residents of the port of San Francisco, the welfare of which I sincerely desire, I have approved the plan which you have formed for the commencement of said town, under which, and while other matters are being arranged as well for the system of civil authorities, it will be born in mind for the cases of granting lots to the individuals who may solicit them.

All which I state to you for your satisfaction, thuaking you for the services which gratuitously you propose to do in favor of those residents. God and Liberty.

(Signed) JOSÉ CASTRO.

Monterey, Oct. 20th, 1835.

To Señor Don Guillermo Richardson,
Captain of the Port of San Francisco.

I, George Fisher, Secretary of the Board of United States Commissioners, to ascertain and settle private land claims in

California, do hereby certify that the foregoing is a true and correct copy of a paper endorsed "Translation of Exhibit No. 1, A. F." annexed to deposition of Wm. A. Richardson, and filed in case No. 280, wherein the city of San Francisco is claimant, among the archives of said Board, in my care and custody as such Secretary.

Given under my hand this 22d day of Sept. 1853.

GEORGE FISHER, *Sec'y.*

The following deposition of Señor Don Francisco Arce is important. It shows the inception of the negotiations between Governor Micheltorena and Señor Limantour. The document referred to in the 3d Interogatory as "Exhibit No. 1," with the initials "A. F." annexed to the deposition of Wm. A. Richardson, is the original letter from Manuel Jimeno to Capt. Richardson, dated at Los Angeles, January 14th, 1843, seeking information in regard to the lands at Yerba Buena, which Señor Limantour proposed to purchase and to ascertain if they were vacant. Please to mark the answers of the witness to the questions in this deposition.

The document referred to in Question 5th, as "Exhibit No. 2," annexed to the deposition of W. E. P. Hartnell, is Governor Micheltorena's Letter to Señor Limantour, dated at Los Angeles, January 8th, 1843.

The document referred to in the 8th Question, as marked "Exhibit No. 4," with the initials "A. F." and annexed to the deposition of W. E. P. Hartnell, is the original deed from Governor Micheltorena to José Y. Limantour. The attentive reader who is anxious to learn the truth, will not fail to consider this testimony in connexion with these important documents referred to in it, and subject both to a rigid scrutiny and critical examination.

DEPOSITION OF FRANCISCO ARCE.

Office of the Board of U. S. Commissioners.

This day, before Commissioner Alpheus Felch, came Francisco Arce, a witness in behalf of claimant, José Y. Limentour, No. 548, who after being duly sworn, deposed as follows:

QUESTIONS BY GEN. JAMES WILSON, ATTORNEY FOR THE CLAIMANT.

Question 1.—What is your name, age and place of residence?

Answer.—My name is Francisco Arce, my age is thirty years, and I reside in Santa Clara County, in the State of California.

Question 2.—What offices have you held in the Government of California, and at what times?

Answer.—From April, A. D. 1836 to February, A. D. 1846, I was Chief Clerk in the office of the Secretary of the Departmental Government, the commission for which I now hold in my possession. I also acted as Secretary, *ad interim*, for a short time at Los Angeles, under a commission from Governor Micheltorena. Some papers are certified by me as Chief Clerk, and some as Secretary, *ad interim.*

Question 3.—Please look on the document now shown to you marked "Exhibit No. 1," with the initials "A. F." annexed to the deposition of William A. Richardson, taken and filed in this case, and state if you know in whose hand-writing the body of said papers is written, and the direction thereto, and in whose hand-writing the signature thereto is.

Answer.—I have examined the paper; the body of it is my own hand-writing, and the signature thereto is in the hand-writing of Manuel Jimeno. The address or direction at the bottom of the second page is in my own hand-writing. It is directed to William A. Richardson, Captain of the port of San Francisco.

Question 4.—At the time the said paper purports to be dated, was you a clerk in the office of Manuel Jimeno, and what office did Jimeno hold at that time under the government of California?

[Mr. Howard objects to this question.]

Answer.—I was clerk in the office of said Jimeno at that time, and he was Secretary of the Departmental Government of California.

Question 5.—Please look on the document now shown you, marked "Exhibit No. 2," and annexed to the deposition of W. E. P. Hartnell, heretofore taken and filed in this case, and state whether you know the hand-writing, both of the body and signatures thereof.

[Mr. Howard objects to the proof of the document as a mere private paper.]

Answer.—I have examined them; the body and signature are both in the hand-writing of Manuel Micheltorena.

Question 6.—Are you acquainted with José Y. Limantour, and if so, when and where did you first become acquainted with him?

Answer.—I knew him and first became acquainted with him at Monterey, in 1840 or 1841, I cannot distinctly recollect which. He was then captain of a merchant schooner, under the Mexican flag.

Question 7.—Did you see said Limantour at Los Angeles in January, 1843, and do you know whether he had any business with Governor Micheltorena at that time? if so, state what that business was, as far as you know.

[Mr. Howard objects to this question.]

Answer.—I saw said Limantour in Los Angeles, but cannot state exactly the time. I believe it was about the time above mentioned. He had business with Governor Micheltorena at that and several other times. His business with Governor Micheltorena was that of furnishing the Governor for the use of the troops, with money and goods, provisions and other things required for them, which acts are public and notorious in California.

Question 8.—Please to look on the document now shown to you marked "Exhibit No. 4," and also with the initials "A. F.," and annexed to the deposition of W. E. P. Hartnell, heretofore taken and filed in this case, and state whether you recognize the hand-writing of the body of said papers, and of the signatures thereto—and if so, state in whose hand-writing they are?

[Mr. Howard objects to this question as to the form in which it is put, and also to the competency of the paper offered to be proved as evidence of title.]

Answer.—The hand-writing of the body of the paper is that of Captain Marciel, as I believe, who was one of the clerks in the office of the Commandante General Micheltorena, and the signature thereto is the signature of Manuel Micheltorena, Governor and Commandante General. It is the signature which he used and was in the habit of using.

Question 9.—State if you know whether any answer, accompanied by any plat or map, was received by the Governor or the Secretary, to the letter which you have before stated was written in your own hand-writing, and signed by Manuel Jimeno?

[Mr. Howard objects to this question.]

Answer.—I do not recollect, but I believe that there was.

QUESTIONS BY MR. HOWARD, LAW AGENT.

Question 1.—Have you any recollection of the paper above mentioned, marked "Exhibit No. 1," other than that which you received from its having been shown to you within a recent period?

Answer.—I recollect the paper very well.

Question 2.—Do you recollect the paper from any other circumstance than the appearance of the paper and the handwriting?

Answer.—I do recollect it.

Question 3.—From what circumstances do you recollect it?

Answer.—I recollect from the circumstance of being engaged in other business. Mr. Limantour came frequently to the office and molested me on the subject, to be despatched in order to leave in his vessel.

(Signed) FRANCISCO ARCE.

Subscribed and sworn to before me, this nineteenth day of September, A. D. 1853.

(Signed) ALPHEUS FELCH.

I, George Fisher, Secretary of the Board of Commissioners to ascertain and settle the private land claims in California, do hereby certify that the foregoing is a true, correct and full copy of the deposition of Francisco Arce, filed in case No. 548, (wherein José Y. Limantour is claimant) among the archives of said Board, and in my care and custody as such Secretary.

Given under my hand, at the city of San Francisco, this seventeenth day of October, A. D. 1843.

GEORGE FISHER, *Sec'y.*

Office of the Board of U. S. Commissioners, &c.

This day before Commissioner Alpheus Felch, came José Abrego, a witness in behalf of claimant José Y. Limantour, No. 549, who after being duly sworn, deposed as follows:

QUESTIONS BY GENERAL JAMES WILSON, ATTORNEY FOR CLAIMANT.

Question 1.—What is your name, age and place of residence?

Answer.—My name is José Abrego, my age forty years, and I reside in Monterey, California.

Question 2.—Are you acquainted with José Y. Limantour? If yea, when did you first become acquainted with him.

Answer.—I am acquainted with him, and have known him a little more or less, since the year 1841.

Question 3.—What office did you hold in California during the time of Governor Micheltorena's administration here?

Answer.—I was Commissary, and as such had charge of the accounts.

Question 4.—Do you or do you not know of José Y. Limantour furnishing money, goods and supplies, to Governor Micheltorena, for himself and his troops, and for the support of his administration while Governor of California?

Answer.—Said Limantour did at different times furnish Micheltorena and his Officers with goods and money, and at one time, Mr. Thomas O. Larkin received from Limantour, by order of Micheltorena, some thirty thousand dollars, a little more or less, which said Larkin distributed according to Micheltorena's orders.

Question 5.—What amount did said Limantour furnish to Micheltorena in all?

Answer.—According to an account presented by Micheltorena himself to this deponent, in order that he might remit the same to Mexico, it appeared that he had received from Limantour in all, eighty thousand dollars or thereabouts. That account was liquidated by an order on the Government of Mexico, in favor of said Limantour, for some sixty or sixty-six thousand dollars, and the balance was retained by said Micheltorena, in payment for certain lands granted to said Limantour, in Upper and Lower California.

Question 6.—In stating your accounts to remit to the Government of Mexico, were the facts mentioned in your last answer, entered upon it.

Answer.—The accounts belonging to the Commissary's office, embraced the amounts distributed by the Commissary himself, but the accounts of Micheltorena embraced the sums received by Micheltorena himself, and of which he himself rendered an account. The Government of Mexico required me, as Commissary, to send the accounts of Micheltorena to them at Mexico; and I sent the original account, with such explanations as I thought fit. I sent with the account also a certificate of Thomas O. Larkin, of the amount received by him from Limantour.

Question 7.—During the time of Governor Micheltorena's administration in California, had he, to your knowledge, any other source upon which to rely for money, goods or supplies, except on the said José Y. Limantour.

Answer.—Yes; he received funds from the Custom House at Mazatlan, from the Custom House at Monterey, from different merchants, and amongst others from Larkin, to whom he remained indebted ten thousand dollars. He received about one hundred and twenty thousand dollars from the Custom House at Monterey.

QUESTIONS BY MR. GREENHOW, ASSOCIATE LAW AGENT.

Question 1.—Have you any account books or papers relating to your office as Commissary, which support or establish what you have stated with regard to advances made by Mr. Limantour?

Answer.—I have none in my possession. The Commissary's accounts were kept by debit and credit entries, in books destined to that purpose; but the accounts of Micheltorena were handed to the Commissary by Micheltorena himself, on separate strips or pieces of paper, showing the different amounts which he had received, and which he had paid out. I remitted to Mexico the original receipts and papers given to me by Micheltorena, addressed to the General Treasury.

Question 2.—How did you know that lands were granted to Limantour by Micheltorena, in return for supplies advanced as already stated by you?

Answer.—I know it from Micheltorena's own account, in which the fact was stated.

Question 3.—Did you know any other foreigner having received lands from Micheltorena, in return for supplies?

Answer.—I do not know of any such.

(Signed) JOSÈ ABREGO.

It is agreed that this deposition be read and considered in case No. 715.

(Signed) J. WILSON.

(Signed) ROBERT GREENHOW, Ass't Law Agent.

This testimony was given in the Spanish language, Wm. E. P. Hartnell acting by consent of the Attorneys on both sides, as interpreter, having first been duly sworn by me for that purpose.

Subscribed and sworn to before me at San Francisco, this twenty-ninth day of September, 1853.

(Signed) ALPHEUS FELCH.

I, George Fisher, Secretary of the Board of United States Commissioners to ascertain and settle the private land claims in the State of California, hereby certify that the foregoing is a full, true and correct copy of a paper on file among the archives of said Board, and in my care and custody as such Secretary.

Witness my hand this 25th day of November, 1853.

GEORGE FISHER, *Sec'y.*

The documentary evidence, with the testimony of witnesses, which up to this time has been taken in support of the claim of Señor Limantour, has now been laid fully before the public in the foregoing pages.

It is proper here again to refer to the condition of political affairs in California and in Mexico at the time the grant of these lands was made by Governor Micheltorena to Senor Limantour. Governor Micheltorena was sent into California to quiet the political elements, which had been seriously disturbed, and to bring back the Department of Upper California to a firmer union with Mexico.

For some time prior to his appointment, Mexico herself had been subject to serious civil commotions, and frequent successions of revolutionary governments had occurred in that country. Those contests, however, were brought to an end by what is known as the Basis of Government established at Tacubaya, and the election of His Excellency Señor Don Antonio Lopez de Santa Anna as Dictator.

That basis of Government was established on the 28th of September, A. D. 1841, and ratified on the 6th of October, 1841. (*See the first volume of the Observador Judicial, page* 7.) The 7th article of that Basis of Government is as follows: — "The "powers of the Provisional Executive are all those necessary "for the organization of all branches of the Public Administra-"tion."

Thus full power had been conferred upon His Excellency, Santa Anna, and he continued in the uninterrupted exercise of it until near the close of the year 1843, and still retained, substantially, the executive power of the Mexican nation until the year 1844. The Mexican federation was broken up in 1835. The States were reduced to Territories, and the Territories created into "Departments." It was not until the year 1846–7 that the federative system with the Constitution of 1824 was restored. The full powers of the Provisional Executive, held by His Excellency, Santa Anna, was conferred, by him, upon Governor Micheltorena in reference to the Californias, by his letter of instructions, dated February 11th, 1842, a translation of which is here inserted, as follows:

"Most Excellent Sir: His Excellency the President *ad interim* being desirous that the Department of California should take advantage of all the resources which it possesses for its prosperity, for placing itself in a state of defence, and for acquiring that happiness which nature itself invites her to take possession of; and bearing in mind the disturbances which have taken place in the country, and which, on account of the distance, the National Government has not been able to avoid; the situation in which Your Excellency will be placed and the measures which you will have to adopt, and which will not produce the desired effect if you wait for the proper time to put them into execution, for there are matters which do not admit of the least delay, and in the persuasion that Your Excellency will not abuse your powers but that you will exercise them for the welfare and service of the inhabitants of that interesting and fertile Department which the Supreme Government has placed under your charge and responsibility, he (the President) has been pleased to grant to Your Excellency over and above the attributions assigned to you by the existing laws and regulations, as Govornor, Commandant General and Inspector, all the powers which the Supreme Government can confer upon you, in order that by virtaue thereof you may remove from office all such civil and military officers dependent on said Government who shall not fulfil their duties or act up to the confidence reposed in them by the same, and fill their situations by appointing worthy citizens who shall take their places and enter upon their duties, but with the understanding nevertheless that you report to Government the motives of your proceedings for its approbation. The views of the Supreme Magistrate do not only refer to Upper California, but extend likewise to Lower California, where certain seditious movements have appeared, which being fomented by hidden enemies, it has caused some foreigners to take part when their very quality of foreigners prohibits them from intermeddling in domestic strife; and as the President is resolved to protect the troops, authorities, and citizens of said Peninsula, he has determined that your military command shall likewise extend to Lower California as well as the civil command, separating it from Sinaloa, and the Commandant General of the Department of Sonora and Sinaloa will continue to furnish you with the resources and assistance which you may require for the purpose of securing peace, furnishing the troops, providing for the wants of the citizens and enabling you to provide for the prosperity and happiness of the whole Department. Although the first article of the law of 2d November, 1839, derogated the articles of that of the 18th February, of the same year which subjected the subordination of the staff of the army, and the 13th article of the first mentioned decree merely leaves the Commandant General of the East and West with the former attributions of Inspector which they possessed in the Companies of Presidios, His Excellency the President has determined that your powers shall extend as Inspector to the permanent Batalion of California and that you take charge of all the mechanism thereof and report to the staff of the army. You will become acquainted with the good or bad management of the Maritime Custom Houses of both Californias; you will have to examine the situation of all the Missions with respect to their management, improvement and state of accounts; you will have to proceed to the inspection and reorganization of the Companies of the Presidios, and in all cases (were you not to act) the evil would have to remain until Government could resolve. The Supreme Government trusting in your justice and activity, desires that you should meet with no obstacles, and therefore the powers conferred upon you are made extensive to those branches and to all others which may conduce to the welfare of the country, including amongst others, the administration of the Post Office Department, Colonization, the establishment of Presidios, the improvement of Ports, the safety of Towns, the civilization of wild Indians, the education of youth, the opening of roads, the furtherance of the arts, the protection of agriculture and commerce, the establishment of houses of correction, and the establishment of Towns.

You know the views of the Supreme Government, and are well aware that being a friend to improvement it merely desires the union of Mexicans, and that the community in general may enjoy the protection of the laws, be obedient to their authorities, understand that it is our duty to procure the welfare of every one and avoid that all others be injured. I therefore will not detain myself by recommending you to propagate these principles, and will merely mention that when the Supreme Magistrate dictated his instructions, he wished to manifest to you his esteem, and the importance of the command he has confided to you, and to assure the inhabitants of California that the present administration desires their happiness, disavows all apathy, and is ready to impart to that Department all the resources which it may desire and be able to furnish it.

I communicate this to Your Excellency for your satisfaction. God and Liberty. Mexico, 11 February, 1842.=Tornel.=To General Don Manuel Micheltorena."

I also think it proper to insert here the translations of a few sections of a general decree issued and published by His Excellency Santa Anna, on the 14th day of March, A. D. 1842, in relation to the right of foreigners to take and hold property in lands in any of the Departments of Mexico.

The entire decree may be found in the book entitled "Ordenanzes de Tierras y Aguas," at pages 64, 65, 66 and 67.

"Article 1.—Foreigners established and residing in the Republic, may acquire and possess town and country property by sale, adjudication, denouncement, or any other title established by law." Article second, allows foreigners to acquire property in mines, &c.

Article 8, relates to the sale and transfer of property acquired by foreigners.

"Article 9.—These provisions do not comprehend the "Departments on the frontiers or boundaries of other nations, "respecting which special laws of Colonization will be issued, "and no foreigner shall ever be entitled to acquire property "therein without the express permission of the Supreme "Government of the Republic."

That express provision Señor Limantour did procure, as fully shown above.

It has not been required of me, by my client, in the preparation of this pamphlet, to write out an argument, either upon the law or the facts of the case. That is to be done before another tribunal. In the conclusion of my labor upon this statement, I cannot forego the remark that this case has now been in my hands full ten months. The best powers that I possess have been faithrully, diligently, and I may say anxiously applied to its investigation.

If it is a false, fraudulent, or a simulated claim, there is not a man in this community more desirous to know it than the humble individual who now writes this sentence. I hope I have too much self respect, and too high a regard for common honesty, to prosecute a false or fraudulent claim.

With a perfect knowledge of all the papers and documents in the case; a careful consideration of all the testimony taken, I am constrained to say, and I do most conscientiously say, that there is not, and in my firm belief there cannot possibly be, the slightest indicia of fraud in it, or in any way connected with it. "Fraud is to be proved, not inferred."

The claimant, Señor Don José Y. Limantour, comes here from the city of Mexico, where he resides, and where he has had his home for the last ten years of his life. He brought with him testimonials of high character and integrity from persons of the highest official positions in the Government of Mexico, and the representatives of other nations resident near that Government. He has been here, at this time, well-nigh a year, and is known to a great many of the older residents of California, native and foreign. His case was presented before the Honorable the Board of Land Commissioners to ascertain and settle private land claims, in February last. His documents have been open for examination and inspection, and they have been thoroughly examined and scrutinized by sagacious men having deep interests at stake, and learned lawyers ready for liberal fees; and hitherto, not a shade of doubt has been cast upon any of the documents; not a particle of testimony taken to throw a cloud, or the shadow of a cloud, upon his claim. How then can I doubt its validity? What honest, disinterested man can doubt it? If not valid, what becomes of human testimony to establish rights to property?

Governor Micheltorena was here as Governor of California, with full powers from the Supreme Government of Mexico. Mexico owned the lands; Governor Micheltorena was distressingly in want of Señor Limantour's money and goods. He says so to Señor Limantour, and states distinctly to him, that he has ample powers to give him lands in exchange; the negotiation is completed; Limantour delivers his goods and his money upon that assurance; Micheltorena delivers his deed upon that consideration, conveying a full, absolute, unconditional title; the deed is taken to the Supreme Government at the city of Mexico, clothed as it was, and exercising as it did, *de facto*, absolute powers, and that Supreme Government endorses its full, absolute, unqualified approbation upon the deed of grant. Say *that deed* of grant is not valid! *Never—never!* It cannot be so said without rushing rough-shod and blindfold over all the facts in the case, and all the law and equity in christendom.

JAMES WILSON,
Attorney to J. Y. Limantour.

San Francisco, Nov. 28, 1853.

Since the foregoing sheets were put to press, an additional deposition has been taken in support of Señor Limantour's claim. The binding of the pamphlet has been stopped, that the deposition may be printed and bound with what precedes.

J. W.

December 1, 1853.

Office of the Board of U. S. Land Commissioners,
San Francisco, Nov. 30th, 1853.

On this day, before Commissioner Alpheus Felch, came Victor Prudon, a witness for the claimant, José Y. Limantour, petition No. 548, and being duly sworn, deposed as follows:

QUESTIONS BY GENERAL JAMES WILSON, ATTORNEY FOR CLAIMANT.

Question 1.—What are your name, age, profession and place of residence?

Answer.—My name is Victor Prudon. My age, forty-four years. My place of residence is San Francisco, in California. Before the taking of the country by the Americans, I was Lieutenant Colonel of the Mexican Army. I was also at one time Secretary of the Civil Government, and at another, Secretary to the Military Department in California. I have been a resident of California since 1834.

Question 2.—Are you acquainted with José Y. Limantour—If yea, where and when did you first become acquainted with him?

Answer.—I am acquainted with him. I first knew him some time about the fall of 1841, here at Yerba Buena, after his shipwreck at Punta del Reyes.

Question 3.—What was Mr. Limantour engaged in or doing at that time?

Answer.—He was known here as the Captain of a Mexican vessel, and the owner of said vessel and cargo. From that time (1841) until 1847, he made several voyages between Mexico and the coast of California in the same character, exchanging his goods for hides and tallow, as was customary in the country, and then selling the hides and tallow to the American ships for cash.

Question 4.—Do you know anything about advances of money, sales of provisions or merchandise by said Limantour to Micheltorena, Governor of California, in the years 1843 and 1844?—If yea, state all the circumstances and your means of knowledge.

Answer.—I know Captain Limantour made several advances of money and sales of provisions and merchandise to the Government of California in 1843 and 1844, and I remember particularly these circumstances: at the latter part of 1842 and beginning of 1843, I was at Los Angeles with General Micheltorena, whom I conducted there from Mexico in virtue of a special Military Commission, with which I was invested by the Commander in Chief of California, General M. G. Vallejo, with the object of obtaining from the Supreme Government of Mexico a sufficient force to protect and defend this country against any foreign invasion. General Santa Anna, who was then President of the Mexican Republic, on my representation, ordered the expedition of General Micheltorena, whom I conducted under orders with five hundred men to Los Angeles, where we established provisionally our head-quarters; awaiting meanwhile, the arrival from Mazatlan of stores, money, provisions, &c. Some three or four months having elapsed without the arrival of the expected supplies, the troops being in a complete state of destitution, that occasioned amongst them an alarming discontent and frequent desertions, General Micheltorena sent me to San Pedro with a letter directed to Captain Limantour, for the purpose of obtaining from him the money and supplies which we in vain expected from Mazatlan, and solicited at Los Angeles. Captain Limantour accompanied me back to head-quarters at Los Angeles, and there and then made arrangements with Governor Micheltorena for furnishing him with the money and supplies that he wanted. This was in 1843.

In 1844, I knew officially, of other supplies made by Limantour to Governor Micheltorena at Monterey.

Question 5.—Please to look on the paper now exhibited to you marked at the top with the initials " A. F.," endorsed on the back " Exhibit No. 2," and annexed to the deposition of W. E. P. Hartnell, heretofore taken in this case, and purporting to be an original letter from Governor Micheltorena to José Y. Limantour, dated at Los Angeles on the 8th day of January, 1843, and state whether you have seen said letter before, and explain all you know about it.

Answer. I have looked on said document. This same letter I carried from Los Angeles to San Pedro. It is all in the hand-writing of Micheltorena himself. I recognize the letter because I read it to Limantour at his request, as at that time he was very imperfectly acquainted with the Spanish language. I carried the letter to said Limantour at the time before mentioned.

Question 6. Do you or did you know of any grants of land made by the Mexican Government in California, or Governor Micheltorena to Mr. Limantour? If yea, state what lands were so granted, the circumstances under which they were granted, and your means of knowledge in relation thereto.

Answer. What I know is that in discussing the letter of Micheltorena, above mentioned, I learned that Limantour intended to ask all the vacant land between the Yerba Buena and the Mission of Dolores, and another tract about the Presidio. The idea made me laugh, and I advised him to ask at the same time the privilege of monopolizing the wind and sand. Then I knew that the idea was not his own, but suggested to him by Mr. Duflot De Mofras, who visited California invested with a Scientific and Political Mission by the French Government, and who then said that those lands should before long acquire an immense value. I then objected to Limantour, that notwithstanding the promise of Governor Micheltorena in his letter, I did not know how he, Limantour, being a foreigner not naturalized, could hold lands in the Mexican Territory. We made a bet on the subject, and when the case was submitted to General Micheltorena, he (Micheltorena) convinced me by showing me a decree of Santa Anna, in the year 1842, allowing to foreigners the right to hold real estate in the Mexican Republic. Said decree I did not know before. After that I translated into Spanish, at the request of Limantour, a petition that he had written in French, asking for the vacant lands between Yerba Buena and the Mission of Dolores, and another tract about the Presidio. Said petition, rendered into Spanish by me, was transcribed by Limantour and so presented to Governor Micheltorena, and I recollect to have seen the same some time afterwards in the Secretary's office, with a decree of General Micheltorena, granting to Limantour said lands and ordering the issue of titles.

Question 7. You say you laughed at Limantour's idea of purchasing the lands referred to in your last answer. Please to state the condition of those lands—what were they fit for, and what was their value at that time?

Answer. The only value they had then was the wood which was on them, and which was good for firewood or charcoal. They were hilly, sandy, and covered with bushes and trees; a part of the land was in that condition, and the other part contained low lands, marshes, lagoons, and corrupted water throughout the year. There was no improvement on any portion of the land.

Question 8. Please to state the time when you came to live in Yerba Buena, and how long you continued to reside at that place.

Answer. I lived in Yerba Buena from 1839 until 1841, inclusive.

Question 9. What was the extent or the dimensions of the place called Yerba Buena, at that time? and the number or amount of the population?

Answer. The extent was about five or six hundred varas in breadth, from Leese's house to Spear's house, and about twelve hundred varas in length, from Fuller's house to Juan Brione's house, which dimensions corresponded nearly to the space included between Stockton and Montgomery streets and between California or Pine street and Green street. The population amounted to about twenty inhabitants, of whom one only was a Mexican by birth, that was Juan Briones.

Question 10. What do you know, if any thing, of there having been a Pueblo where San Francisco now is?

Answer. I never knew that there was anything here but a little hamlet of the description above given. There was never in Yerba Buena a Municipal Hall nor a Parochial Church, two things very essential in the Mexican Pueblo; and I never heard the place of Yerba Buena called otherwise than Yerba Buena, or Loma Alta, whilst it was always customary to say the Pueblo of San José, the Pueblo of Los Angeles, &c.

Question 11. Do you know anything of a survey having been made of Yerba Buena? If yea, when and by whom?

Answer. I recollect that there was a survey and map of Yerba Buena made by Capt. Vioget. I think it was in the latter part of 1839 or beginning of 1840, when Francisco Guerreno was Sub Prefect and residing at the Mission of Dolores. The limits of that map, which I have seen several times, correspond very near to those which I have described.

Question 12. How long did you continue in the service of the Government, and near the Governor, after coming into California with Governor Micheltorena? and in what capacity?

Answer. I remained in the service of Mexico until 1846, when I was made prisoner by the Americans at Sonoma. I remained with Micheltorena until about the middle of 1843, acting as Secretary of the Military Department, and then I was sent to Sonoma, where I was Commandante of that post until 1846, and in the exercise of my service, had frequent occasions to go to Monterey and confer with General Micheltorena.

Question 13. Please to look at the document now exhibited to you, marked with the initials "A. F.," Exhibit No. 4, annexed to the deposition of Wm. E. P. Hartnell, heretofore taken and filed in this case, purporting to be the original deed from Governor Micheltorena to José Y. Limantour of the lands claimed in this case, and say whether you recognize the handwriting of the body of said deed? if yea, state whose it is.

Answer. I have looked on said document. I think it is the hand-writing of Captain Maciel, then a Captain in General

Micheltorena's expedition. It is not in the hand-writing of any of the Clerks at the Government office; but it was customary when they were pressed with too much writing, for some other person employed in the service to render them aid, and Maciel was often employed in that capacity. The signature to the document I believe to be Governor Micheltorena's.

QUESTIONS BY MR. GREENHOW, ASSOCIATE LAW AGENT.

Question 1. Who was the Secretary of the Civil Department under Governor Micheltorena during the winter of 1842–3?

Answer. General Micheltorena had no Civil Secretary until he arrived at Monterey, which was, I think, about the latter part of 1843. After he arrived there Manuel Jimeno was his Civil Secretary. The business of the Civil Department was performed by either of the officers who had the best hand-writing, or was the most capable of writing properly, until Jimeno assumed the duties.

Question 2. What was Manuel Jimeno's business at Los Angeles, during the winter of 1842--3?

Answer. He went there as the Governor *ad interim* to put General Micheltorena in possession of the Government to which he was appointed by Mexico. I do not know how long Jimeno remained at Los Angeles, but it was only a short time.

Question 3. Did Governor Micheltorena pay Mr. Limantour for the supplies furnished to him in any other way than by grants of land?

Answer. I only know that General Micheltorena gave to Limantonr some drafts or orders against the Custom House at Mazatlan; but I do not know whether they were paid or not. I know that the Custom House at Mazatlan had orders from the Government of Mexico to pay Limantour eight thousand dollars a month during the time Micheltorena should remain in California.

Question 4. Did you see Mr. Limantour in Yerba Buena after the period last mentioned? if so, when?

Answer. I have seen him several times since then at Sonoma, Yerba Buena, and Monterey. I cannot tell positively or separately the dates when I saw him at either of those places.

Question 5. Did you see him at either of those in the summer of 1847?

Answer. I saw him at Yerba Buena some time in the year 1847.

Question 6. Do you recollect whether Mr. Limantour in 1847 spoke in any manner publicly of his title to lands in or near this place?

Answer. I cannot recollect.

Question 7. Was any part of the land now claimed by Limantour at this place then occupied under grants from the authorities of this City?

Answer. In the first place I do not know exactly which lands Mr. Limantour claims, but no part of the land between the dimensions of Yerba Buena, as I have above described them and the Mission of Dolores was then occupied, nor ever granted to or solicited by any body else to my knowledge.

Question 8. Did you see Limantour in California from 1847 until within the last year?

Answer. I did not.

QUESTIONS BY GENERAL WILSON.

Question 1. Was it known to the prominent men in California that the lands near the Yerba Buena and the Presidio had been granted to Limantour by Governor Micheltorena?

Answer. I believe that it was known by all the principal persons, and I am sure that it was known by several of the principal persons of California. It was known to Micheltorena and many officers of his expedition. It was also known by Alvarado, José Castro, Jimeno, Gaudalupe, and Salvador Vallejo, Arce, Sanchez, myself and some others. The Sanchez meant now lives at Monterey, and was one of Micheltorena's officers.

(Signed) VICTOR PRUDON.

Subscribed and sworn to before me, this 30th day of November, 1853.

(Signed) ALPHEUS FELCH, *Commissioner.*

I, George Fisher, Secretary of the Board of U. S. Commissioners to ascertain and settle the private land claims in California, do hereby certify that the foregoing is a true, correct and full copy of a paper on file among the archives of said Board, and in my care and custody as such Secretary.

Witness my hand, this 1st day of December, A. D. 1853.

GEORGE FISHER, *Sec'y.*

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A REPORT

OF THE

SUBSTANCE OF A SPEECH,

DELIVERED BY

E. D. BAKER,

BEFORE THE SENATE OF CALIFORNIA, ON THE FIRST AND
SECOND OF FEBRUARY, IN SUPPORT OF THE CHARGE OF

AN ATTEMPT TO COMMIT BRIBERY,

MADE BY

MR. PECK, SENATOR FROM BUTTE COUNTY

AGAINST

JOSEPH C. PALMER.

CALIFORNIA STATE LIBRARY

SAN FRANCISCO:
PLACER TIMES AND TRANSCRIPT PRINT.
1854.

DEFENCE.

Mr. President and Gentlemen of the Senate :—

I am very glad that at last I am permitted to open my lips in the defence of a gentleman who has entrusted his character and his honor, in some sense, to my hands. I am glad that I am allowed to defend him before a tribunal which embodies within itself much of whatever of dignity there is in Republican Institutions, and I beg leave to say that I feel as sensibly as gentlemen upon the other side, the respect, the veneration, due to the tribunal before which I stand. I know very well that there is here no display of pomp, no gorgeous trappings of power, but I know that the dignity of the Senate is deeply felt by the people of this Commonwealth, for whom you are here to legislate. I know when these pillars shall have crumbled, and the men who compose this body shall have passed away, the manner in which you upheld your own dignity, shall be felt and remembered for good or for evil.

In that spirit I approach the task assigned to me, and if there have been some things which I could have wished otherwise, I am inclined to view them rather as an evidence of the strict impartiality of the Senate, than as proof of any bias or feeling against the man whose case I am here to plead. It is a spectacle of surpassing interest to observe the strict sense of justice which causes this Senate to forget its relations to individuals. It is a matter perhaps of proud observation, that when a Senator, a member of this body, an equal, is arraigned, if he is not denied the privilege accorded to the meanest criminal, nothing else is allowed him; his statements pass for nothing; his character stands him in no stead; his word, his motives, his oath, is at every step disputed; instead of saying, as the Senate might have said, he is a member of our body, we will accord to him common honesty and honor; he is in the beginning confronted with a fearful adversary, surrounded by able and numerous counsel; instead of making his statements a mere prelimenary to further proceedings, he is subjected to a cross examination, acute, bitter, prolonged, pitiless; until, if I did not fear to say the word, the dignity of the Senate has been outraged in the person of a Senator; in fact, counsel have been allowed to ask questions in a tone so scornful, that the very pages upon the floor have been taught to sneer at your equal. But this I mention as an evidence of the strict impartiality of the Senate.

What the Senate of Rome would never have allowed, or would have punished as a contempt, in Julius or Augustus Ceasar, you have not only admitted but applauded, in a private citizen. According to every form you have adopted, you have put your own Senator upon trial, and professing to be actuated by a sense of justice, you try him like a criminal and compel him to struggle for what is more than life.

When an offence has been committed against the character of a deliberative body, it has, hitherto, required but the statement of a Senator or Representative, by virtue of his office as proof of the charge, to put the defendant upon his defence. I do not say that the statement of a Senator or Representative in Congress would affirmatively establish the truth of a charge; that might at least depend upon the testimony; but for the purpose of preliminary proceedings, a mere statement has been sufficient to found a charge, fix the proceedings, and call the criminal to the bar. Hitherto, in all civilized countries, the mere statement of a Senator or a Representative, has been held sufficient. Not so here. No sooner has the charge been made from a sense of public duty, than a labored attempt is made to go into an investigation, where there is not one but two parties, and if possible, to show that the Senate is inclined to be more than impartial, or rather to act with strict impartiality, the criminal, the accused, the offender, is allowed to be confronted with the man who makes the charge, to deny and to add to that denial the sanctity of an oath. Is not this an evidence of strict impartiality. The Senate will not err at least from kindness to one of their own body.

Whoever heard or dreamed that in a court of Justice the word of a criminal was taken, although it was the word of a man revelling in wealth. If Mr. Palmer had been accused in a Court of perjury or forgery—what Court, what Judge, what courtesy would allow him to come up, and deny, beyond the plea of not guilty? What Court, I repeat, would permit him to hurl back the charge and bring his accuser to trial? Where else would he be allowed to give his evidence under oath, and that too, without being subjected to cross examination? It is a mode of jurisprudence which may be just, but it is unusual; and I ask, is there any known Court where such a procedure would be allowed?

It is said that this proceeding is in the nature of a Bill in Equity, and with a play upon words more creditable to his fancy than his legal knowledge, my learned friend has asked, "will not the Senate deal in equity?"

Why should all forms thus be reversed? What is there in the character of this transaction to turn this into a Bill of Equity, and this Senate Chamber into a Court of Chancery?

I remember I was once called upon to defend a man who was charged with a contempt of court. He had called the presiding officer by a name which I will not now repeat; I was then inexperienced and I contended that I had a right to empannel a jury to try the fact as to whether he was rightly called. I feel the shame for that folly, which gentlemen should feel now for the attempt to turn a proceeding against the dignity of this body into a Bill of Equity, and this for purpose of directing the oath of the accused against the accuser. Fontleroy, the English Banker, was accused of forgery, and had he been allowed to swear in his own defence he would have said that he was innocent and persecuted. A man who would commit the first offence, would back it up by perjury ; and the kindness of friends does him an injustice when they compel him to come in here and purge himself by an oath. The descent to crime is gradual ; a man driven by hate or love or fear or avarice, to commit one crime, will not stop at a solemn assertion of his innocence to conceal it. Every word of the denial of an accused is but an appeal to the accuser to prove the fact, and the attempt to allow Mr. Palmer to prove his innocence upon oath is unjust—unknown to all the teachings of the law, to all forms of legislation in all countries, civilized or barbarous, on the earth.

The position of these parties gives this case an importance which it would not otherwise have possessed. It is a question whether a contempt has been committed against the dignity of the Senate. (No very deadly crime until these perjuries had been committed.) Either a hasty or wanton attempt to corrupt a member of this body, thereby reflecting contempt upon this body itself—and if something were not peculiar in the relation which this party occupies towards the community—and that the crime itself bears a peculiar prominence in the history of this Community—the interest which is now felt in this case would be without cause or foundation.

The State of California is a new State—wealthy—and the means of creating wealth has assumed new forms and sought new revenues. There is a feeling that is prevalent in the community that these vast fortunes which have suddenly sprung up (like the palace of Alladin in a single night,) have not always been gained by fair, open, manly, honorable exertion ; skill will do much, enterprise much, good fortune more ; but neither the skill or fortune, nor all the enterprise ever combined in the hand or brain of one man would have sufficed to have reared those princely palaces which emulate and rival the marts of India or Europe. There are colossal fortunes held by persons who seek to control the means of acquiring wealth by governing the politics of the Commonwealth.

I need not say to you that it is a matter of public history, that—tampering with Legislatures ; with Common Councils ; with Municipal Organizations ; agents of the State Government—agents of the Federal Government—are charges that are as familiar as household words. No man denies that this is so. Not a Senator fresh from the mountains, not a Representative coming from gulch and hollow, that is not able to go into the city of San Francisco and point out store after store, palace after palace, that have arisen as if by magic, and have not arisen by fair means in the opinion of the whole community.

One of these merchant princes is here ; one of these deep, designing, artful, ingenious, bold, able men, is here, whose name is, has been, perhaps yet will be, connected with every vast scheme of doubtful enterprise with which California has so much abounded. I need not name the measures, one by one—they are known.

I am far from saying that all these charges are true ; most of them occurred before I became a resident of this State, but I have heard the charges made, in common with your fellow citizens, and I speak of this as being one cause that imparts importance to this cause which nothing else can give it.

Sir, it is but justice to myself to admit that against this party, this array of wealth, power and strength my feeble powers are most unequally matched.

Upon the other side we have a man who, thirty days ago, was as utterly unknown to the world as if such a man had never existed—the people of his county, from their knowledge of his character—trusting not in his ability, for he has but little—but from their knowledge of his truth and worth, which will prove better than the highest ability, have sent him here. He comes here simple, innocent—from the mountains—he was but little qualified to cope with the master spirits here, who with a nod could shake the financial or political interests of the State. He comes here simple as a child, and he comes forward and tells you his plain, unpretending story. He had been a book-keeper for a short time in San Francisco, but he had been living for the last two years among the mountains, until sent as a Senator here. He did not know a member of your body. At the time this attempt was made to bribe him he said that he knew Col. May. How did he know him? He roomed with him. Therefore knew him. He had not found out where he stood. Broderick, he had heard of, but whether he was a myth or a reality he did not know. Palmer, Cook & Co., he did not know by name, much less that there was such a third power in the State—even the virtuous Selover he did not know. Of their power to raise or depress—to scatter blessings or convulse the State—of all this was Mr. Peck profoundly ignorant. Sir, he was so most unfortunately, for the very first thing he does is to bring himself into deadly conflict with all these powers.

The first thing, according to their theory, that the man does—simple, unlearned, ignorant, sent here by accident—the first thing that he does is to set himself alone by a deliberate attempt, by forgery of facts, perjury of words, wicked, base, malignant perjury, to charge the most powerful institutions in this State—possessing the greatest influence ever known, with an offence, which, if proved upon them, would reflect shame and disgrace upon Broderick, Palmer, Wright & Co., and even upon Mr. Selover.

I seek no occasion to charge Mr. Broderick—distinguished as he is said to be by the power which he possesses over the hearts of his countrymen. In common with my fellow citizens I have a profound respect for Mr. Broderick, and if the extent of his influence does somewhat surprise me I repress that surprise. As far as he is concerned, there is no proof that convicts him of the slightest knowledge of the transaction. Mr. Peck never would have dared—it never occurred to his simple head to attack Mr. Broderick, and because Mr. Palmer followed up a well known usual plan, I see no reason that Mr. Broderick should be charged. I protest against Mr. Broderick's name being used in one way or the other.

In one opinion of my learned friend I concur. After expressing his pity for Mr. Peck, he says that he has either told the truth, or sworn to a lie, and on this I agree with him. Now then, he has done it alone, or had help, and I call upon the counsel to tell me whether they intend to insist that there was a conspiracy against Broderick, Palmer, Cook & Company, or that Mr. Peck has undertaken this alone, and I will take either line of argument and disprove it. My theory is that Mr. Palmer did make the attempt and is now attempting to swear himself clear from it. All their attempts to pity Peck are not facts; all this commiseration for his circumstances is not argument. Mr. Peck knows truth from falsehood, and he is here now an innocent, persecuted, maligned, conspired-against man, or else he alone, or in company with others whose names have been mentioned here has been perjuring himself, and conspiring against one of the most powerful companies in our State.

The learned counsel has told us how he pitied Mr. Peck. What can he do against a banker? Simple minded man from the country, what can he do? no friends, no money. If he talks with Truett and Hammond he is charged with conspiracy; when he tells what happens to himself alone he is charged with perjury; but in either case, whether conspiring or committing perjury, he is to be pitied, and yet Mr. Peck is neither more nor less than a Senator upon this floor, and what he has done has been done from motives of public interest and public welfare alone. He has done many things which my judgment does not approve—many things which, if he had remained here one month longer, he never would have done. Going to Palmer, Cook & Co.'s office, going to Broderick's headquarters, intimidated by Sclover. He is not a hero or a lion, but he is armed with truth and able to bear himself with truth against all his foes; and I rejoice that I am permitted once more in my life to stand up on the side of poverty, against all the wealth and power, and influence of this State or any other State.

One of two things is to be taken as true in their line of defence. There is either a conspiracy against Mr. Palmer or against Mr. Broderick, or Mr. Peck has committed all this alone. I don't wish to discuss both propositions. If counsel will tell me which line they will attempt to prove, I care not which, I will disprove it. It is either Peck alone, or Peck, Truett and Hammond, or the criminal is sitting there. I heard of this conspiracy, this combination for an unholy purpose, and until I came to this city I was led to believe that there might be some foundation for it, but what do we hear? Mr. Hammond says he has not said one word. His interest is said to be at stake; Hammond against Broderick. Mr. Palmer having left Mr. Gwin, he is supposed to be out of the way. Once the life and soul of the Gwin party, Mr. Palmer has deserted him and he has fallen so low that there are "none so poor as do him reverence." When they say there is a conspiracy on foot to defeat Mr. Broderick this is what they maintain, that Mr. Peck has been induced to come forward and say that Mr. Palmer has offered him a bribe—that this is a lie; that being a lie, Truett, Hammond & Co. are pushing forward this investigation for the purpose of defeating Mr. Broderick. That is the plain English of this charge of conspiracy. To that there is but one reply. Here or there are the conspirators. I don't stop to make comparisons, but I know this man, (Mr. Hammond,) and I care not what Mr. Palmer cannot do what Mr. Broderick can do, but I say that Mr. Hammond is incapable of such an act. I say this of one whom I am proud to regard as a personal friend. Sir, he can compare with the proudest of them all—in the counsels of the State, in the most responsible offices, on the field of battle, in all the relations of life—known, honored, trusted by all around him. I make no invidious comparison, but I challenge any man to assert that by word or deed Mr. Hammond is a conspirator where perjury is the foundation and fraud the superstructure. Such aspersions have no credence, sure, in the minds of men whose malignity leads them to suspect what they scarcely dare openly to avow.

They talk of conspirators, conspiracy. Who pledges himself to the fact? where are the witnesses? The whole charge is without foundation, from the beginning to the end.

Mr. Truett is supposed not to like Mr. Broderick; no great crime in that. Mr.

Broderick can well afford to love Mr. Truett, he has been eminently succesful, and whether he is right or wrong in this family quarrel I neither know nor care. I should not be very sorry if they were to occur more frequently, nor should I greatly grieve if the present dominant party were to lose some of their spring feathers.

I think that Mr. Truett was glad that he had an opportunity of exposing the rascality of the other side. I believe that if Mr. Truett had been allowed to speak, he would have said that he believed every word of Peek's story—that the effort was made to get one or two votes more, and to elect Mr. Broderick, and that he was especially glad when Mr. Peck told him that this event had occurred; he would have been more or less than man had he not felt so, not thinking very much at the time of his friendship for Mr. Peck.

Here is a charge made against what they call a faction; but why do they blame Truett or Hammond for what Mr. Peck never said or did? Whom have they bought? Whom have they paid? Whom have they suborned? But, say they, Mr. Peck has gone to the heads of the Democratic party instead of the heads of the Whig party. What is the reason? In the first place, I do not say that Mr. Peck is a very wise man; next, it is difficult to find the heads of the Whig party. We are like lost sheep upon the mountains of *Sin*, and if I were to look for the heads of the Whig party, when I had found some seven or eight gentlemen for whom I have the highest personal regard, I should be very much troubled to find their followers; and besides, he knew no Whigs here. He was acquainted with Col. May because he roomed with him, but he had no introduction, as yet, to the gentlemen who were members of the Whig party.

Sir, he was in San Francisco, and he happened to know Mr. Truett, not as a politician, but as a merchant, and so he went and told Truett at that stage of the proceedings. But, says one, what does Peck mean—why does he not knock Palmer down? What does Peck mean, says another, by keeping it from Saturday until Tuesday,—why did he not mention it directly? Ah, says another, what a d—d fool Peck was, not to take Joe Palmer's five thousand dollars, and then fool him. Thus we see that each man would have acted differently. And even admitting that Mr. Peck did not take the surest course—that he did not do right who is there among us who can look upon his past life and not see a great many things that might have been done better, with our present experience to guide us?

> Vain were were the man, and false as vain,
> Who said were he ordained to run
> His course of being o'er again,
> He would do all that he had done.

I suppose that Mr. Peck does not read poetry, but he subscribes to the sentiment. He gets a secret upon his mind—he never was bought—he never was worth buying before—he did not know what to do with himself. After thinking two or three days, he goes and tells his friend Truett. I ask you, do you believe that when Peck did this, he said to himself, "Now I have told a lie, and have offered to be bribed, and I will be bribed not merely to vote for a Senator, but I will be bribed to lie so basely, so calumniously, that it will vie in crime and atrocity with the worst crimes of brigands and murderers ever recorded in history.

He tells the story to Mr. Truett; Mr. Truett takes him home to Mr. Hammond; Mr. Hammond sits ensconced in the dignity of the Custom House, and says not a word, Mr. Peck arrives at Benicia, and Mr. Selover arrives in haste, when an exposure is threatened, and threats and badgers—intimidates Mr. Peck, until friends come to his relief and demand that the whole story shall be told, and when it is told what do they reply?—that it is a conspiracy. Where is the conspiracy? Where are the conspirators? The forger, the perjurer is here (Peck) or there (Palmer) or no where. Mr. Peck may say in the words of Benton,—"Solitary and alone I have set this ball in motion."

Let me contrast the position of these parties, not with regard to the community, but as they appear in this case.

In olden times, I had almost said, in better times, a charge and denial of this kind would have led to deadly conflict, spear to spear, horse to horse, man to man, but in the present day intellectual effort alone can be used; it can be made as deadly a conflict by intellect alone as ever was displayed on the field of battle. Mr. Palmer says I will bring able, numerous counsel into Court, and I will examine Peck to death, so that he shall be made to deny his assertions, and if to wear out a man's patience, to brow-beat, to intimidate, with a voice the lowest tones of which are always impressive—stop, sir! put that down—Palmer here, Selover there, three learned counsel in combination; if all this is not sufficient to puzzle the brains of one little mountain Senator, I do not know what is.

I do not mean to blame the practise of cross examination; but it may be carried on so far as to weary the patience of the tribunal. It may be carried to a further extent than for the purpose for which it is allowed by the law, to elicit the truth and the whole truth from the witness.

A cross examination should be to test the truth; lawyers know that it is frequently perverted to perplex and embarrass a witness; and there never was a witness yet who, intending to speak the truth, could be cross examined for a day and a half and could adhere precisely to the same story in its minor points. What the counsel have alleged to be a sovereign test of truth, (strict adherence to one story without variation) is indeed a test of falsehood, and so it is laid down in every book on the philosophy of testimony.

Some of you came to Benicia last Monday; can you tell what was said? whom you talked with upon that occasion? You have been engaged in important transactions in your life; you know the fact; but can you tell the words that surrounded that fact, and if you told the words to-day, by the pressure of a rigid cross examination, could you tell the same to-morrow?

Mr. Wright testifies as to a conversation he had about Mr. Gwin; I heard him, but I did not understand the conversation to be the same as he stated here; yet I may have been mistaken; perhaps neither of us could repeat the conversation exactly; and I should be false to every instinct of my nature were I to say that because a man cannot repeat a conversation exactly as it happened on little matters, that therefore he must be telling a falsehood.

Do you remember what you said when you asked your wife to become yours? you can't remember what you said or what she said; you know the fact that you was accepted, and leaving a little palpitation of the heart out of the question, you can't remember the words at all.

The most solemn articles of our faith, our deepest convictions of the truths of immortality and eternal life depend upon the testimony of men who give a different narration. No college man, no divine, pretends that the Evangalists recite alike the story of Christ's resurrection, yet philosophers and critics have agreed that this very difference, so far from destroying their claims to validity, only proves the fact.

I ask you to apply the argument; again, men differ in their capacity to bear cross examination, according to their moral and physical strength.

There are men who could not have borne such a cross examination half an hour; there are men who would have failed to recollect the minor portions, or have flatly contradicted themselves. If Mr. Peck had been intending to tell a lie from beginning to end, why does he commit himself to so many adversaries? Why does he go to Mr. Lent, not indeed an adversary, but known to be deeply interested in the success of Mr. Broderick. Why does this simple minded man go to their room, Mr. Mahoney sitting down endeavoring to get a statement in his way:

> A chiel's among ye taking notes,
> And faith he'll print 'em.

Why does Mr. Peck go there like a sheep, that ought to have been dumb and was not, in the presence of men that were watching his every word, and why did he say that which, had he been telling a lie, would never have risen to his lips?

But they say that Mr. Peck had not sense enough. I should have told him, had I been advised with, to this effect: Mr Peck, do not say a word about this matter till the proper time and place, and until so told, make no statement—say not a word to any one on the subject, on your life. And such would have been his course had he been an artful, cunning man; but I defy any man, lawyer or not, to see otherwise than that the leading idea of this man's mind was truth, simplicity, weakness, if you please so to term it—but yet truth. He tells Mr. Lent, and mourns over the fact, that Mr. Broderick would not speak to him. What then? He can live without Mr. Broderick, here or there—he has the free air—the open sky—God's sunshine—Broderick or no Broderick. He can stand it as well as his counsel, for I array myself against this monied power, and I shall speak of things and persons as I think they deserve, now and ever.

If Mr. Peck had been telling a lie he would never have allowed them to contradict him as to one important fact, and in one important statement they do contradict him. And the difference is this. You may contradict a man as to what he has said, or admissions that he has made in conversation, it is not of much value: but if you contradict him as to a fact, that is another affair. I never yet heard a witness, who, in the course of a long examination, did not, if he were speaking the truth, contradict himself in minor points, when questioned at different times. But when an important fact is contradicted—that requires earnest, deliberate consideration, and in making this admission I will apply it to this case fully.

Mr. Mahoney and Mr. Lent do not relate the conversation the same as Mr. Selover stated it was—How is this?—"Mr. Selover would not tell a lie." And I have no intention to impute a want of veracity to either Mr. Mahoney or Mr. Lent, but I desire the same allowance should be given to Mr. Peck, when they bring up his admissions to stultify himself. Would the most foolish person in the world make such admissions? What does it all prove? Merely the weakness of human memory as to the recollection of conversation in contradiction to facts as required by the courts of justice and the rules of law, and by this rule I insist that my client can be sustained.

Mr. Peck says, "we conversed upon the common topics of the day, on our way up." Afterwards he said that there had been a conversation about Senators. Ah, says Mr. Williams, now I have caught him. Do you call that conversation the mere talking upon the common topics of the day? So, after a while, he finds out that there was three conversations. What was the use of dividing and subdividing—making that three which was in reality but one? Ah, but says the counsel, your client swears it was going down. Ours swears that it was going up. Undoubtedly he docs so swear. What man would not plunge his steed deeper in order to get out of the slough? Any man would. Once in, there is no escape—he must plunge through or fail. What sort of consideration does it deserve whether it was going up or down? What difference does it make as to the fact whether he told Col. May on the steps of the Union Hotel, or on the steamboat? Is not this an imperfection to which human nature is liable? And I would ask, what particular necessity existed for Mr. Peck to say it was going down, if it actually happened on going up? Why could he not afford to tell the truth as to that particular? In what respect would a lie as to the time up or down benefit him?

Mr. Selover was asked by Mr. Williams, in slow and measured tones, when—did—you—first—learn—that—Mr.—Peck—had—offered—to—be—bribed—by—Mr.—Palmer?

And Mr. Selover answered in the same slow measured language; on—the—Steamer—Senator—on—her—way—down.

I do not desire to embarrass any man. I have no wish to charge perjury upon any person without foundation; so with my usual frankness, I said, repeat that again, perhaps you are mistaken; and the flush of shame rose to his face not on account of the mistake he had made, but because he felt how hard it was to accuse Mr. Peck because he could not recollect each unimportant particular, while he himself could not tell accurately a statement to which he came here to swear.

Every contradictory statement that the counsel has elicited must be referred to the same cause; the conversation with Col. May was on board the steamboat; it was not on the steps of the Union Hotel. We can prove by Col. May that such a conversation really did take place, but were not allowed—a cross examination of two days, a sufficient time to bewilder almost any man. And why, I would ask, did Mr. Peck tell this story if it was not true? It could not strengthen his case; the evidence was not allowed to confirm his story—but the knowledge that it can be proved, must confirm the belief that he intended to tell the truth.

I sir, make one remark in all earnestness and sincerity—if there be this conflict between the testimony of Mr. Palmer and Mr. Peck, the one a Senator, the other a Banker; one having power, the other having official station; I ask that Mr. Palmer and Mr. Peck shall each submit the best evidence they can offer and let the Senate decide between them. Mr. Palmer or Mr. Peck has sworn to a lie. Mr. Peck has no influence; Mr. Palmer has all. If you censure Mr. Palmer what good will it do Mr. Peck; he is struggling against wind and tide; a single man against power and wealth and political influence; he is as Mr. Selover said, in a gulf begirt with fiery serpents. Either faction ready to crush him if he can escape from the gulf, and is still to live.

Charges, such as these, have been made against Mr. Palmer before; the country is rife with them, I dare them to deny it, I dare them to disprove it upon the floor of this Senate. Therefore I considered it necessary that Mr. Peck should produce evidence as to his character if he wished to stamp this statement as truth. I said to Mr. Peck when he came to me "if you can prove your good character—prove that you are a man of honor—you can sustain your case; if not—if you have been engaged in any doubtful transactions—it will be doubtful. He told me that he could and you have heard his character spoken of. You see him before you; he is not learned nor well connected, nor well educated, nor rich, nor powerful; but he is an honest man. From his boyhood up, no man's lip has defamed him; no man's tongue has maligned him; no doubtful reputation precedes him or pursues him. He is now upon his first trial upon his entrance into public life; he is in a gulf surrounded by serpents, almost alone, and he calls upon his character to be his staff through the dark valley he has been called upon to tread.

Where is the other man's character? I have not taken counsel by surprise. I warned them that where there was a doubt, that character would be called upon to save or destroy.

I know the covered insolence of their intentions. I know what they mean. What, say they, shall we put the character of a poor mountain miner, without a dollar to bless himself, without a friend in the world, in competition with the character of the great Banker, the associate of merchant princes? Deeply connected with every colossal scheme of enterprise or politics of this State?

What, says the counsel, "don't you know Mr. Palmer, the banker, the great banker? We do not require to prove our character." But still that is just what the law requires you to prove.

Mr. Peck comes forward and demands that his character shall stand in his stead, and although Mr. Palmer may sell bills and discount notes, yet he may not be able to prove that he possesses the character of an upright, honorable man.

How is this. You senators heard me make that offer in all fairness days ago. I said I have proved the character of Mr. Peck; it has not a taint upon it. I call upon you now to prove your client's character. If you do not, I shall insist that you cannot. If you do I shall impeach it; and I am here to ask you senators if any haughty assumption of superior rank or influence can or should weigh against the character of an honest man?

> The rank is but the guinea's stamp,
> The man's the gold for a' that.

If that were not the rule of law and sense, what is character made for? What good does it do—what is gained by it? Providence has wisely arranged that every worthy effort is rewarded,—not indeed in every human event, but in the general course of human events. It is true that uprightness and honor bring their own reward, and although in the sunny days of prosperity, surrounded by friends wielding influence, you may not feel so much the inestimable treasure of a good character, yet you will feel it when the time of trial comes on—when friends fall away and influence has departed—still you have a defense, it is "the shadow of a great rock in a weary land." You can repose upon the proud consciousness of the past, and so doing defy the malice of your enemies. Is it not just? Is it not right? Thus, and thus only, you place the poor and the rich on the same equality.

Now if Mr. Palmer had a good character, why did he not show it by witnesses? I dwell upon this point because I feel that this refusal is a haughty assumption of power. If Mr. Palmer had been a poor man, with this charge against him, if he had a good character, he would have proved it. Now wealth and influence stand in the place of character, and they look down with scorn upon the only appeal we can make.

I say that it is incumbent upon Mr. Palmer to prove his reputation, and that I have a right to assume that he has no such reputation if he does not. It is law.

[Here Mr. Baker read various authorities, sustaining this proposition.]

Hampered by enemies, liable to misapprehension, a good character is in the day of trouble, a tower of strength. No haughty assumption of power, no wealth, influence, or political strength, will stand in its stead. The man of good character may rejoice in its strength. The man of bad or doubtful character must always be fearful.

In this case there existed a peculiar necessity why this should have been proved, for this attempt at bribery is an offence that is said to have been often committed in our unfortunate state. It is said this man is at the very head and front of the offenders. This may not be true. But when they have the audacity to offer their oath against our's—their statement against another man's—they must mean to say, "my character is as good as your's," or, "if my statement is doubtful, your's is doubtful." Let us then appeal to past history—to the character formed of us by our neighbors and friends, and I have a right so to speak, for if they did offer to prove it, I could disprove it again and again.

This particular crime has tainted the reputation of many men. These men can go upon change; their names are good for the endorsement of a bill; but this particular crime has been charged upon them again and again, ever since the passage of the Water Lot Bill.

I do not make this charge upon my own responsibility. I don't know it to be so, but I do say, that if they had presented his character we should have tried it, and I should have been glad to have put the mountain against the city—the valley against the growing marts, and I would have endeavored to show the truth as it is.

Men may intrigue and frame bills that may pass legislatures, may pass municipalities; they may make money, but they may fail to gain honor. If a man will sell his soul to mammon he must expect that when the day of trial comes his refuge and his defence will fail him. My client can stand proudly in this light, like the shepherd boy of old; he has but his sling and his stone, but his character is his weapon, and it will smite the giant in the forehead.

[At this point in Mr. Baker's argument the Senate adjourned till the next morning.]

Mr. President, and Gentlemen of the Senate.

I should consider myself wanting in my duty if I did not seize this occasion to return my profound and respectful acknowledgments for the courtesy with which I was listened to by the Senate yesterday.

In common with yourself, I am sure, Mr. President, I felt pleased and flattered with the rather unusual fact that the presence of a number of the fairer portion of our community graced your halls, and I was reminded when I saw them brightening the precincts of this Assembly of the golden and purple hues of sun-light playing around the edges of the dark cloud within whose bosom the thunderbolt is sleeping. Sir, do we not join in the wish that this Senate may ever so preserve its dignity as to attract such an audience, and that so fair a presence may be found to grace your Assembly as long as these streams may roll and these mountains endure

I have been properly reminded that some of the remarks I made yesterday might in some sense be considered as invidious, in drawing a comparison between the population of the country and the city.

It is difficult for an advocate, (and I am here but a poor advocate before a high deliberative body,) difficult to choose the precise words at all times, by which he can give expression to his ideas.

Sir, no man can be otherwise than proud of the diverse interests of our whole population. I am not here for the miserable purpose of arraying one portion of our population against the other, and I have not one word to say against the vast mercantile and commercial interests which have grown up in our midst, but I did say that according to common apprehension some of the stately buildings in San Francisco are an evidence of the particular crime here charged; that this crime has laid the foundation of colossal fortunes, and I repeat the assertion But I am proud to draw a line of distinction. There are fortunes gained there with undoubted honor. There is a population as hardy and as vigorous as ever breathed the mountain air. There are men whom neither the storm at sea, the tempest on land, or the breath of fiery conflagrations that have successively swept over the city, can repress or weary men of irrepressible energy, untiring industry and far-seeing wisdom; and if in such a population there are some of doubtful character who have reared their fortunes to a colossal pitch of grandeur, these are the exceptions, not the rule; the rule being integrity and honor, the exception the reverse; and to the exception alone did I allude.

An attempt to draw a distinction between the coast and the mountain can have no profitable effect upon this controversy. I did not draw a distinction between San Francisco and the county of Butte between our level valleys and leaping mountains; but between this man and his defamer; between this weakness and that strength; between that array and this loveliness; between this inexperience and that cunning. What I said yesterday relates to the individual facts in this particular case, no further; and I qualify and explain if what I said yesterday was misunderstood. Sir, it is our whole population, our whole interests, of which we have a right to be proud—mountain, valley, hill, plain, city, we may indeed say—

> What constitutes a State?
> Not high reared battlement nor labor'd mound,
> Thick walls nor moated gates,
> Not cities proud, with spires and turret crown'd,
> Not bays nor broad armed ports,
> Where laughing at the storm rich navies ride;
> Not starred and spangled Courts
> Where low brow'd baseness yields perfume to pride;
> But men; high minded men;
> Men who their duties know,

But know their rights and knowing dare maintain,
Prevent the long aimed blow;
And crush the tyrant while they rend the chain.
These constitute a State!

I attempted on yesterday, to enforce two or three propositions by general argument, and I beg leave to call your attention to what I shall have here to offer in conclusion. I alluded to the nature of this controversy, and the position of these parties; I alluded to the manner in which this charge has been attempted to be rebutted. I said that it consists with but one single marked exception, of attempts to contradict a witness upon points not material to the real issue; upon statements he had previously made; upon the recollection of other witnesses; any foundation for a charge of departure from truth, being wisely pronounced fallacious by the law of testimony.

I endeavored in my general argument to present to the consideration of the Senate, that every impulse of the human mind, every examination of the motives that governs man's actions, point out to us the fact that this man tells the truth, that the other is compelled to resort to falsehood.

I pointed out the position of my client as evidence of the fact; he has nothing to gain but everything to lose by the falsehood. It is contrary to the experience of human actions that a man such as he is, and has been, should come here and commit the most demoniacal perjury against a powerful citizen for nothing.

I endeavored to show that the charge of conspiracy was a signal and an utter failure; that in the nature of things there could be no such conspiracy. I endeavored to show that to take their own view of the case, it was a doubtful state of facts. They claim the right to be heard upon oath, and if you give Mr. Palmer the privilege of his oath as a witness; if you make this a Bill in Equity, it is assertion and denial, oath against oath, and in that point of view I urged before the Senate the question of character; I urged that previous good character should add to credibility, and I felt that I appealed successfully to every legal mind in the Assembly.

I beg leave to add that where a party is a defendant, not a witness, his character cannot be first attacked. If the other party chooses to consider Mr. Peck as a witness, they can impeach him; if he was merely a defendant, you cannot impeach his general character until he attempts to sustain it. Mr. Palmer is not a witness—he is a defendant, and if they had introduced evidence of general good character we must abide by it or rebut it. I gave notice that after having proved the character of Mr. Peck, if they attempted to prove the character of Mr. Palmer; I should impeach him; if they did not, I should assume that they could not. Mr. President—

Money is not character. Proof of correct money dealings is not character. A man may have a bad character yet his note may be as good as a Shylock's or a Baring's, and I insist that it is in their power, if they had a good character, to prove it. They have failed even to attempt it, and are justly liable to the imputation that they cannot. The man who in a doubtful position does not throw himself upon his past reputation, is liable to the charge that he cannot do so, and I appeal to the whole experience of human like in support of my assertion.

I shall now discuss for a few moments the nature of the charge, and the kind of process by which it is reasonable to suppose that it can be sustained.

This is a charge of an attempt to bribe, and from its very nature must be an offence committed privately. I am not now speaking of whether this offence has been committed at all or not, but merely as to the general nature of the offence.

There are some offences that from their character, must be committed in open day, and in the presence of a number of witnesses; such as levying war against the State. There are, then, other offences which, from their very nature, must be secret and private.

Take for instance, forgery. That must be an offence secret and private. You can seldom bring up witnesses upon the stand to swear to the commission of the act, for the effect can only be accomplished when it is [committed secretly and privately. Now the offence of bribery is of this character. No man comes into this Senate and says I will give you $5000 for your vote, and the only reason they are now charged, is the unblushing boldness of the approach of the firm of Palmer, Cook & Co.

Mr. Wright testified in his cross examination that he had not said he would give $100,000 to defeat Gwin, but he sees proper to qualify his expression, and says that he has made use of terms publicly, broad cast over the State, which shows his meaning, and lays his glittering piles of wealth before the doubtful and the wavering.

A decent respect for the opinions of men, the necessity for some sort of appearance, prevents him from coming up in open] Senate and saying, I will give you money to vote to bring on the Senatorial election.

He says he would not now give any man a dollar. Yet if any Senator or Representative will vote for his friend for sympathy for him, this ingenious gentlemansays that he]would divide his last dollar with them ; is the fact denied by him. What a tender appeal to the affections of the sympathetic. What a line of argument this suggests to the mind of the doubtful. Says the doubtful member, it wont answer for them to come to me and offer me $10,000 or $20,000, clearly not; but Mr. Wright is a man of a sympathetic nature, answering chords respond in my bosom, and sweep the master-strings of my spirit, when I have cast my vote, when Gwin is humbled and Broderick triumphant, "the observed of all observers," then I will go down to San Francisco, I will see Mr.;Wright—there heart to heart, the swelling tears flowing from each, while we are in each others embrace; there, even there I will touch the almighty dollar.

Gentlemen, these are golden sympathies, you may speculate on the nature of bribery ; can it assume a bolder shape than that. I will not bribe you, but if your sympathies can flow in a common current with mine, what have I that I will not give you ? to my last dollar I will divide. Unexampled generosity. Why even the just Selover when he thinks it necessary to produce an effect upon the public mind, (and he never bribes) says he does not, he never exposes his own weakness, says he does not, but even Mr. Selover says that he thinks their side has got as much money as the other side, and he thinks a little more.

What does this man mean ? And again it is followed up. According to Mr. Palmer's statement, when Mr. Peck offers his vote for $5000, Mr. Palmer does not say, sir, we do not bribe ; but he talks off, suggests that he will give something by his manner, says that it is a great deal of money. We want, says he to himself, eight Senators, eight times 5000 is 40,000 for a single Senatorial election, and the enmity of Gwin for six years to boot; and Palmer wonders whethe

the house can stand the drain. Further, he can get no help from Broderick, for incorruptible as he is, and as we have no reason to doubt he is, he cannot be called upon to throw a portion of his fund into the common treasury, because, with a delicate appreciation of Broderick's feelings, Mr. Palmer says that David is not to know anything about it, as it would shock his virtuous soul.

I mention this in the direct line of argument, to show the nature of the crime and the manner of its approach. It storms the citadel with bags of gold; makes its approaches, not in open day-light, not in frowning columns or serried battalions, but sinuously, artfully, quietly, secretly, to one man alone, or if to men in public, by a general offer—they make broad cast suggestions at which the virtuous may frown but the doubtful may nibble.

I ask every Senator, suppose, when Mr. Wright said that he would not give a dollar now, but that if any member would vote through sympathy with him, he would divide his last dollar with him, and suppose there was some easy soul—some poor Eve of the other sex—who listened as our first mother listened to the voice of the tempter—would not this suggestion that he would divide his last dollar, make a Senator or Representative nibble at it if he was weak minded.

If you were contemplating a change of friends—about to yield to the malignity which is persecuting Mr. Gwin to the death, and fall into the ranks of the successful faction—if you were waiting to find some decent opportunity to worship the golden calf—would not the words of Wright sound like the voice of the charmer in your ears. 100,000—sympathy—divide his last dollar. What does he mean? That is an appeal made to the weakest part of man's nature.—Our necessities are supposed to throw us in the market, and evil suggestions are offered to our ear.

Sir, if any man expects to see bribery assume any other shape than this, he is mistaken. Men do not marry corruption as they do a beautiful woman—they do not say to it, I will take you and hug you to my bosom—they do not take it in the open eye of day, but in private places—doubtful men—in secrecy—in a crowd; (for a man is never more alone than in a crowd); in such places the voice of the seducer is heard as was the voice of the serpent of old.

If it had been true that Mr. Palmer had offered any of you a bribe, there could have been but your oath; he would not do it in public—he could not come in the Senate except by the line that Mr. Wright adopted, and you must take the statements of a single man if you wish to convict of bribery. We talk sometimes of corruption; does any man see it? can you clutch it? It is as impalpable as the air-drawn dagger of Macbeth, when he says—

> "Is this a dagger that I see before me?"

So with bribery; it is formless, though not voiceless.

I repeat that to employ the argument that this is not to be believed, is contrary to the whole philosophy of testimony in such a case. There must be a correspondence between the nature of the proof and the charge, They must partake of the same nature; if the crime is secret, the proof cannot be given by many. For instance: You don't prove a physical fact as you prove a moral one. You do not prove a law of gravity as you prove a law of exchange, because the propositions differ; and there must be a natural and proper correspondence between the nature of the thing to be proved and the mode to prove it.

Newton proved the law of gravitation, but he did not bring a witness into court to prove it. Locke established important doctrines as to the human mind, and proved it, but he did not introduce a single deposition. So with bribery; the proof must correspond with the nature of the offence. It is secret and private, and must frequently be charged by the oath of one man.

From this there flows another fact: that when the proof of bribery consists of the testimony of one simple witness, it is liable to all that class of invalidation which the counsel have directed to bear against it.

Again: no man who tells the truth studies what he will say, or what will be the effect of all the corresponding circumstances around him. And if, gentlemen, you insist that the man who makes the charge upon his own oath, is to make the proof clear, by an accurate statement of all the minor matters, or that he will at all times repeat exactly the same story, that it will not vary in minor points under a cross-examination, you expect to see what will not happen,—what you will look for in vain.

> " Whoe'er expects a faultless work to see,"
> Seeks what ne'er has, nor is, nor e'er shall be.

And he who expects to find a witness who, by admissions in evidence, is not somewhat tangled in the narration of inferior circumstances, looks for that which never was, and never will be in a court of justice or elsewhere.

I will examine the nature of the contradictions against Mr. Peck, and feel confident that you will bring the argument I have offered to bear upon them. I do not deny that in his admissions and statements he has said things which appear in some sense to be at variance from each other. I offered the reasons why it was so. He would not have been innocent otherwise. If some conspirators had got hold of him; if he had been artful and cunning he would have told a story that could not be contradicted. It is not so. He tells you just what came to his mind, in the cross examination, submitting to all the questions asked of him.

I admit that his recollection is far from perfect. Not about the main charge. They cannot shake him as to that fact. What do they make of the admissions? Does it change the fact? A fact is that which has happened. When once a fact has happened—I speak it with all reverence—the Almighty himself cannot change it. He may strike it from every human recollection in the Universe, erase from all created minds all impression of the fact, but a fact that has once happened remains a fact, and an admission does not alter it or change it.

So with a different narrative of the fact. You may change the narration of it, but the main fact remains unchanged.

Mr. Peck does not recollect that he told Mr. Palmer about his circumstances. Mr. Lent says that he said, he thought he did. Mr. Mahoney is stronger, and Mr. Selover is the strongest of all, and is sure he did, and with some little experience in discerning truth, I think it probable that he did say something about his circumstances. I don't know that Mr. Palmer would have been so foolish as to say he would count him down $5000, without something had led to it.

Mr. President, let me request you to observe the circumstance. Here is an election proposed to be held, which is said to be an innovation on every precedent on the subject; whether it is so or not, it is none of my business, but there are people who do care a good deal about it. Mr. Palmer does, so does Mr. Wright, and Mr. Selover, and Mr. Broderick. This question has been canvassed again and again, and it had been ascertained that but a few votes more would carry the election.

People knew pretty well how men were expected to stand, and when Mr. Peck came from the mountains, perhaps feeling a little of his own importance, I think it very probable that something was said about the expenses of the election and his poverty, and his pay of $12 per day was running through his mind—calculating whether that would "make him whole."

He talked too much. The serpent could not have anything to go upon had not Mr. Peck commenced the conversation. Had he said nothing, probably this never would have occurred. He should have felt that he was watched—noticed. When the lion roams abroad the jackall will follow, and when Palmer travels abroad Selover is sure to be not far off. It were vain to deny him his just meed of praise—watchful, cunning, prying "he hopes he don't intrude," but he says, "won't you introduce me to Mr. Peck?" That's done. The next move is—"Mr. Palmer," "Mr. Peck," That's done. Mr. Selover retires. The jackall has done his duty, and is roaming in the forest for fresh prey.

Sir, I think that Mr. Peck did lay himself liable by his artless, foolish conversation to these approaches: but, gentlemen, does that disprove his statement? Is it not in the natural order of things? Is it not so that men act?

Then comes the argument of Mr. Selover, that Mr. Palmer would not offer a bribe upon so short an acquaintance. I don't say, says Mr. Selover, that Mr. Palmer is an honest man—we are too knowing for that, but I do say, that Mr. Palmer is a right smart man. If this had been the third or fourth talk I should not have been surprised—but at the first, it is quite contrary to our rules. That is what Selover says.

What does this man mean? He does not say that he had confidence in the integrity and honor of Mr. Palmer—that he would not do such a thing. No, but he would not do it on "*so short an acquaintance*." He had too much of that "rascally virtue, prudence," to do it. Not that he had too much integrity and honor to do it. I think that Mr. Selover was quite mistaken in saying that he was too smart to do it in so short a time—he would have been smarter still if Mr. Selover could have said "My friend is too honest, too just, to commit such a crime. They rely not upon his character, but upon his head.

Sir, it is expecting too much of Mr. Palmer to suppose him capable of committing a crime, and then to require him to do it with unerring skill. The highest intellects which stoop to crime are not exempt from the danger of detection. Satan himself was weak enough to rebel—for all crime is weakness—and against the consequences of that guilt no wisdom could shield, no power protect; no art could save, no arms defend—he fell "to rise no more."

Guilt is perpetually unveiling its own secrets: when it plunges itself in the deepest caverns, and imagines that it is forever out of sight, it lifts its head to behold itself in the full blaze of a meridan day. Is not this human experience? With what face can a lawyer say, "My client did not commit forgery—he is too smart. But this is their argument.

They talk of conspiracy, but is there no signs of one on the other side? Who rides in the deep midnight? Who braves the tempest? Why does he not wait for the following morning for the steamboat? Mr. Selover is a real estate auctioneer; does his business lead him to this unwonted ride? He says, we have got more money than the other side. Who is the we? How does it happen that every fact opposed to us comes from those who in feeling and interest are connected together? How does it happen that not upon admissions, mere statements, but upon very facts we contradict them? I will show you how.

By a rule of the Senate it was decided that Mr. Palmer should not prove conversations with Mr. Selover. The next thing was to say what Mr. Palmer told him. He said that he knew of Peck's offer to be bribed almost as soon as it happened, and I could not help their getting it out; it is not the first time that a mistake has been made by avoiding the naked truth.

Mr. Selover says that coming up on the boat he was told by Mr. Palmer that Mr. Peck wanted to be bought. Now their whole souls were engaged in this business of bringing on the election. Suppose you had been in Mr. Palmer's condition and had found out that there was a man to be bribed and that you could probably get another vote; if upright you would have said I will not buy; or have yielded as Mr. Palmer admitted he did, and said it was a great deal of money; or you would have told Messrs. Broderick, Lent and Mahoney, and they and you would have been specially glad. While I think these gentlemen would have been incapable of the purpose of buying Mr. Peck or any body else, yet from their characters and intelligence they could not have objected to have learnt the dear, tender secret, and it would not have particularly displeased any of these gentlemen to have known that a vote had been offered, and that Mr. Palmer could buy it if he choose. If they could find a little secret of that kind should they not hug it to their bosoms.

Is it not Rochefoucault, Mr. President, who says "something there is that does not entirely displease us even in the misfortunes of our best friends;" certainly it would not if it happened to our enemies. And as a matter of party tactics would not Selover have said Mr. Peck can be bought, he has offered himself, if we do not choose to buy him, we can expose him. Watch him, if he does not go strait, threaten to expose him. Such a course would have been natural, but what does Selover do? he remains silent. He does not tell Mr. Broderick, or let the senators, his friends, know—he kept the secret from mortal ears, tells no one this important fact which can change the whole aspect of nations by placing Mr. Broderick in the Senate. He is silent; is that human nature? should it have been so? would any man do so? According to all the rules of human conduct it would not, and I affirm that the argument cannot be shaken. Connected as he was with these men by every tie, his statement that he kept it locked in his own breast, is contrary to what every reasonable man would have done in the premises. A man may tell a lie, but he cannot act contrary to the experience of all the world.

But there is another point. If Mr. Peek had gone to the banking house first, the facts would have been against us. Mr. Selover returned to San Francisco without saying a word about this matter until Tuesday. But Mr. Selover then stated that he did not introduce Mr. Peck to Mr. Palmer at all, and persisted in that statement until he found that it could be proved by another witness. I asked Mr. Selover the question, who introduced Mr. Peck to Mr. Palmer? Auctioneer, as he is, he hesitated to knock off truth to the highest bidder; he had to say going, going, before he was gone. But he said that he did. I then asked him if he had not said it was a damn'd lie? He admitted he had declared it so, but said he had forgotten the fact. Could he forget? Did he forget? For what purpose did he introduce Mr. Peck to Mr. Palmer? He had no social qualities that were likely to be attractive to Mr. Palmer. Mr. Peck is a gentleman of ordinary courtesy—ordinary intelligence. But Mr. Selover did not do it for that purpose. He had friends—rich, powerful friends. He wandered in search of prey, and he found it; and if Mr. Palmer had denied that he had been of service, Selover might justly have complained. "I found him, I introduced him, I took the overland route, and now you deny my jackall-ship."

Did Selover forget the main fact for which he was here; as well might you expect a woman to forget her conquests, or a mother her love for her child. He had performed his mission, then he retired gracefully. Did he forget the purpose that he so successfully accomplished? most assuredly not.

This was the turning point in this case—this was the connecting link. We understood that Mr. Taylor was about going home to the States, and I was in despair; but he remained long enough to testify to this fact. Then Mr. Selover remembered—I am afraid that Mr. Selover had a willing memory—when he had performed his duty he tried to forget everything about the facts.

Let me show you another thing about which there can be no dispute, to show what Selover came here for, and why he came.

It seems a Whig Senator had offered to be bribed, and had made this offer to two persons; they had, therefore, two witnesses—direct proof to overwhem Peck and expel him from the Senate, and they hear, to their profound astonishment, that the bribee charges them with being the bribers.

If I were to attempt to do you some deadly injury, and it came to your ears that I was going to charge you with the same fact, you would scorn, defy, repel me. What do they do?

Would Selover come up to remonstrate with a man who is going to commit the deadliest perjury? He comes suddenly, for fear that it would be urged that Mr. Palmer was part and parcel of the act. Yet it was said that Mr. Palmer opposed the coming and that Mr. Wr ght's motives to come were because Mr. Palmer opposed it.

Mr. Wright says that Mr. Selover and Mr. Palmer were both opposed to it. Selover says he wanted to come—a contradiction, not a perjury; but one of those things about which there is misapprehension and mis-statement. It is all innocent and pure. One train of reasoning shows why Selover wanted to come; another shows that both he and Mr. Palmer were opposed to it. But what harm could Peck do while they wielded a thunderbolt to crush him.

What harm had Mr. Palmer to apprehend from Mr. Peck, if he did swear to a lie? What did they come here for at all?

They came because, like the corrupt judge in ancient story, they feared and trembled. They came here to intimidate Mr. Peck, in a moral sense, at least, to bring him in their power.

What does Selover say? Does he say—Mr. Peck, how dare you do this? don't you know you offered to be bought in my presence? how dare you make this charge? That would have been his language if he had been an honest man; but he comes worming, twining, seeking, spying—goes to David's head-quarters, seduces Peck to make statements—Mahoney waiting to write them down.

It is to disguise, cover up, not to admit the truth, not to confront Mr. Peck, that Selover comes. In a criminal prosecution, when a man is charged and flies, the presumption of guilt is strong—"the wicked flee when no man pursueth." Selover fled to Benicia when no truth had yet appeared. The presumption arising from a man's conduct is an irresistible argument. It qualifies and explains the motives of his inmost soul. No man's reputation or innocence can be at the mercy of a base conspiracy, when he has facts upon which he can rest secure. He can rest upon his magnanimity, upon his country and upon the final judgment. Mr. Palmer did not rely much upon the justice of his country. He had tried it too often.

Selover got here. What did he do? He intimidated Mr. Peck. You saw his manner when he was subjected to cross-examination. You saw the broad attempt to intimidate Mr. Peck; a man somewhat deficient in experience and judgment.

And yet I do not hesitate to avouch that in personal courage and honor, he is equal to any one of them.

Hence came the picture of the variegated serpents—the gulf—hence the threat, that he would be crushed by contending factions; the very thing that Selover wanted; what else did he want but to crush him. True Selover calls it sympathy. Sympathy for a man who could invent a lie. Does not he profess to feel in the words of Homer,

"Whom want itself can force untruth to tell,
My soul detests him as the gates of Hell."

Virtuous to a fault, Selover is; he comes here to compromise; listen to his language. He does not say, Mr. Peck you have told a lie; he says, Mr. Peck it is a mistake. Now when a man knocks another down, it is rather an awkward apology to say it is a mistake. If Selover was telling the truth, Peck was a liar, and he knew it. It was either the truth or a bitter, base, malignant falsehood, that would press to the earth, the head of any one who dared to utter it. He did not come here and say, Mr. Peck you are about to perjure yourself. Oh! no. Mr. Peck it is a mistake. Come down—write down—see Mr. Palmer—give Mr. Truett a writing to treat it as though it never had happened.

The whole statement is inconsistent, if the fact had not really happened. It is against all human experience, which is the best argument and the best evidence.

There is some contradiction about the statements as to the times Peck went to see Mr. Palmer. Peck stopped at the door while somebody went in to get a drink. Now Peck was not smart, and I will tell you why.

If Mr. Peck had been as smart as experience will teach him to be now, he would either have resented it at the moment, or said nothing until he had conversed with friends—then acted promptly, or not at all; in the meanwhile have refused to see Palmer. That would have been wise. But upon the other hand, no two men would have done the same thing. Senator Wade would have knocked him down. Senator Tuttle would have considered before he said anything; other gentlemen might have adopted a different course. That proves nothing against Mr. Peck. Like a woman—when Mr. Peck had a secret, he must tell it; so he went to Truett, because he knew him as a merchant—the only man he knew.

He did not want to go to Mr. Broderick—Mr. Palmer had told him not to do so. And from the moment he told Truett, he, in some sense, is mixed up with politics.

Mr. Peck now hesitates. He does not want to get into trouble. He begins to see by the rushing smoke, what the flame must be, and with that moral timidity which gentlemen have charged him with, he wishes he was out of it.

What is Mr. Peck's condition? Put to immense expense—traduced—his reputation, his character, friends, position, all at stake. For what? For whom? Whom does he serve? If he is successful—if the Senate reprimands Mr. Palmer, what then? Mr. Peck takes his seat as before—sinks into the level of a common man, if not—

I leave it to Senators what must be his position if at this solemn moment of his life, the Senate shall refuse to sustain him.

But they say that he offered to be bribed again, but that is only by Selover, and that on a forced construction entirely. But then it is oath against oath· Palmer is not a witness. The most material point remains untouched, and that brings me to the discussion of another branch of the law of evidence.

Mr. Palmer is not a witness; his oath is not to be taken; it is the simple denial of a criminal. They have other facts—collateral facts, that Mr. Peck told him that he had a desire to be whole, or make himself whole. Mr. Peck says he did not. Whom will you believe, Peck or Selover? I say nothing of the fact that Mr. Peck, in the origin of this controversy had no motive to lie. It is oath against oath, and by the rules of law, if you do not know which to believe, you must leave out the fact as if it did not exist.

[Here Mr. Baker read several authorities.]

The meaning of that is this; where a story is told that does not necessarily involve perjury, and oath is sworn against oath, you are bound to believe that it is a mistake, rather than a perjury. For instance—Selover said Peck said what he never did. This must be considered a mistake; an over anxiety on the part of Selover to find somebody to bribe, rather than that Peck was guilty of perjury. Peck may have said something about his expenses—he may have said something about being made whole, but he denies the construction which Selover places upon it, and so denying you are bound to reject the whole.

But the whole story is consistent with the story of an innocent man. It has cost him something to pay his expenses, it has cost him something to get here, and he expects to get whole by his pay as a Senator. I deny that the conversation with Selover will bear the construction he places on it from the beginning to the end.

But they say he went to Palmer again. He went to Palmer because he understood that Mr. Palmer wanted to see him. Truett told him to go. Truett wanted to catch them; he wanted the bribery confirmed; he was not a Broderick or a Palmer man; nay more, he had not this weakness, this pleasant amiability that Mr. Selover had; he did not care about exposing them; he wished to proclaim to the world that Mr. Broderick wanted to buy a poor Whig; and if he could catch them he desired to do it. Peck went by Truett's advice. Now they say he went twice, but on this point, like the others I have mentioned, there is a subdivision not founded in fact. They say he went twice; but if I were to ask them to fix the time, it would trouble them. At what and how many times do the learned counsel intend to prove that Mr. Peck went on Tuesday?

WILLIAMS—He went some two or three times; what he went for I cau't guess from his testimony.

BAKER—Do you insist that he went there twice?

WILLIAMS—Yes.

BAKER—Mr. Palmer says it was about one or two o'clock, he had not seen him at the time of lunch. Mr. Wright swears that it was before twelve, but that he did not speak to him at all. A man lunches when he is hungry, and to predicate perjury upon the wants of the stomach, is absurd.

Now see how it turns out; Peck went to Truett, told him the story; sometime in the afternoon, he met Denver who said Mr. Palmer had been inquiring for him; he goes to Truett—Truett advises him to go, and he goes. And thus this talk of several times, is not so.

Do you doubt that Peck went to Truett and said to him that Mr. Palmer was inquiring for him. Mr. Denver had told him so; they don't deny it, they know that it is so.

Graham says it was between two and three. Mr. Palmer between one and two. Selover says he saw Peck going about two o'clock. Mr. Peck could not foretell what Mr. Denver would say to him. We prove that he went but once, then by request of Denver and advice of Truett.

Mr. Denver says it was four o'clock. We say it was not. Nobody, not even Mr. Williams, pretends that he came after that conversation in which Mr. Palmer declined the private conversation. Yet if Mr. Denver's statement is correct, it was four o'clock, and Mr. Peck was at the boat. The truth is, it was between one and three, and only one visit. A little while we had it that Mr. Palmer came in his buggy; now he was talking to Graham. But Peck could not tell what Mr, Denver would tell him, and we prove that he mentioned the fact of Gen. Denver telling him before he went at all.

There is one contradiction of fact between Mr. Graham and Mr. Peck; there is upon one fact a mistake or a perjury. But you must suppose that it is a mistake, if you cannot determine, and throw it out entirely; such is the law. First, it is of no sort of importance whether Mr. Palmer wanted to bribe Mr. Peck a second time, if he did at first; nor whether Graham is to be believed.

I go back upon my line of argument. Mr. Palmer has too much interest at stake to be allowed to testify here; his oath is not to be taken; he is on trial. To deny this doctrine would be to lift the criminal to the level of the accuser, and swell him up to the grand proportions of an indignant prosecutor calling for justice, instead of an infamous defendant.

Mr. Peck is a Senator, a man of honor, of known relations in life, father of a family.

Who is Hicks Graham? Twenty-eight years of age, who from his deposition never appears to have earned a dollar in his life; intimately connected with Palmer; a Filibuster; (lawyer, not much of one,) speculator, *attache* to the Legislature, by which he means scribbling for the papers, writing Broderick articles for the Commercial Advertiser.

We have a right to rely on Mr. Peck ; we have a right to doubt Mr. Graham. Not that we wish to say he is perjured, for we wish to deal with him in all charity and candor ; but according to his own affidavit, the blowing up of the boat injured his recollection, his memory is a little impaired. Why brand Peck with the charge of perjury, upon this statement of Graham's? Why make him false to his enemies, false to his friends, false to everybody ; it is too ridiculous ; and it all rests upon Graham's statement. He says that Mr. Palmer said to Mr. Peck, I am engaged, I cannot see you ; there were probably twenty people in the Banking House. Graham's attention not particularly directed to Mr. Peck. It might not have been Peck ; he might have mistaken one man's voice for another ; it is easier to suppose that Graham was mistaken than that Mr. Peck should forge this deliberate lie, thus breaking the tenor of his past life. What reason was there that Palmer should not see him : the pretence is that Palmer was so indignant that he would not see Peck. Very singular, that very evening they were so particularly anxious to see Mr. Peck that they came over land all the way to find him. Does that accord with the statement of Mr. Palmer ; I can't see you sir ! Within two hours they came to Benicia in hot haste ; beseeching Mr. Peck not to destroy Mr. Broderick's interest, nor defeat the growing aspirations of Palmer, Cook & Co. It is not reasonable ; Mr. Graham must be mistaken when he says that Mr. Palmer would not see him.

The general rules by which Courts of Justice are governed when witnesses contradict each other, is to make the evidence agree with the truth and veracity of all parties if it is possible.

Nobody can believe more than I do the natural inclination of man to tell the truth ; the first impulse of the mind is to tell the truth ; all truth is consistent with itself, and it inclines to leap, like the bright sword of a warrior from its scabbard, from the heart to the lips. Interest, passion, pride may prevent it, but the inclination is there ; and so far as I can see and judge, I am inclined to believe, where it is possible, that the witnesses intend to speak truth.

I demand that this testimony shall be viewed in that light ; I ask you as men, Senators, Judges, to reconcile this to truth as far as you can ; allow for mistakes —for human weakness—for failure of recollection ; read it as fallible men liable to err, and willing to allow for error, and Mr. Peck's case is in all respects safe.

There is indeed in this case one wide and unfortunate difference between Mr. Peck and Mr. Palmer, and they can never more cross and stand upon the same platform ; but as far as the rest of the testimony is concerned, a little charity will cover all mistakes and errors.

If there is a conspiracy still to be charged, I say that this man is guiltless. But I say that upon the other side, every motive, party pride, feeling, friendship, bound these men together with a band as of iron, and that not one witness can we get that is not attached to and dependent upon Palmer, Cook & Co.

Take Graham for instance—attachee to Palmer, Cook & Co. I dont say he is a Broderick man—but every fact, every statement shows that the interest of these witnesses are combined against this man, Mr. Peck.

It is a little singular that within five minutes of the time that Graham says he saw Peck, Mr. Palmer counts him down four or five hundred dollars. I know that this was to buy up scrip ; I know that this was a business transaction ; I know that Mr. Graham had found where he could make a speculation at the expense of some poor County, or of the poor State. All this I admit, but they cannot deny that every witness is bound to them as with hooks of steel; if there is a conspiracy it is upon their side, not ours.

I have thus endeavored, Mr. President, to present a series of suggestions, which arise to my mind, from the proofs before the Senate. I should have feared to weary you with a more labored discussion. and while I willingly avoid more, the importance of the controversy will not justify me in saying less.

The argument which I have offered is, as you will remember, in support of these propositions,

First. That the testimony of Mr. Peck is true, because he has made a charge in which he cannot be mistaken, and one which he has no conceivable motive to fabricate; because he has offered the only kind of proof which the necessary correspondence between the nature of the charge and the character of the testimony will allow; because having made a charge upon his solemn oath, which, when proved, can be of no benefit to him, but which on the contrary involves him in intense difficulties, he is able to maintain it by the pledge of an unsullied reputation; because the whole of the trial has shown that while he is an inexperienced and perhaps timid man, it has also shown him to be utterly incapable of forging a story so monstrous even with the strongest motives, much less with no motive; because the incidental and collateral facts presented by the testimony, support and explain his original statement.

We show, secondly, that the defence of Mr. Palmer is untrue, because, so far as it is based on his own oath, he is not entitled to be considered as a witness, and because he has every conceivable motive to falsify the truth; because his denial is but the usual step downwards which the first error compels; because there is no mode of trial known to the civilized world which will allow such an expurgation; because he has failed to support his statement by proof of former character, although warned of the presumption which this failure would raise against him; because his silence as to the facts implicating Peck until the charge was made public is evidence of guilt; because the attempt to induce Peck to conceal or retract, and failing in this to intimidate him, confirms that guilt; because the attempt to charge conspiracy is proof of a fraudulent intention, which is inconsistent with innocence; because the vain endeavor to shift his ground and to become the accuser is one of the commonest devices of crime, from the time of Potiphar's wife till now.

We show, thirdly, that the effort to invalidate Peck's testimony has been mainly confined to proof of admissions, conversations, variances in minor detail which confirm rather than weaken his statement.

Fourthly, That even this is proved by witnesses who, in point of feeling, interest, friendship, and conduct, are allied with Palmer, from Selover down to Graham, and who are all peculiarly liable to the same method of attack.

And now, Sir, having thus presented some of the arguments by which, in my judgment, the truth and honor of my client can be sustained, I am about to submit this case to the judgment of the Senate.

The facts charged upon Mr. Palmer do not affect Mr. Peck, but they injure the dignity of the Senate, and strike at the welfare of the State. The charge has not been made for private purposes and its truth should not be determined upon for private interests. I do not trust myself to discuss further the anomly by which the witness who accuses the criminal, is himself arraigned and compelled to employ counsel in his defence. The history of this proceeding is already before the country.

Although we have witnessed the presence of the greatest personal and political influences known to the State, entering and acting on this arena. I will not doubt that they are exerted in a legitimate sphere, and above all, I will not doubt that the Senate will preserve its own respect and the respect of the country. Sir, it is in the power of this body to present to the people a noble spectacle; since it can show how weak wealth and influence may be when arrayed against truth and right. Nor is the occasion unworthy of such a judgment.—Who can calculate its effects upon the public morals. Here is an offender begirt with friends and armed with gold—here is a crime which corrupts the very heart of the body politic, and poisons the air we breathe; here is an accuser "in bonds for the truth," surrounded by hissing serpents, relying for his deliverance upon that impartial justice which should find its last and holiest home within these walls. Sir, if to-day you "put the axe to the root of tree," you will strike a trunk beneath whose shade ravenous beasts of prey gather—within whose spreading branches unclean birds love to make their nests.

When the Hebrew prophet struck the rock—

> "From Horeb's flinty side
> Issued a river,"

So the blow that strikes the defendant at your bar, shall open a fountain whose swelling waters will sweep away the festering corruptions which have plagued the State.

Mr. President, my client has had no reason to make this accusation, but his sense of public obligation. The consciousness of duty performed, is his only possible reward. But the art and the falsehood of the accused have so placed him as to compel him to demand your acquital, as if he too were a defendant. He feels as a man should feel, the peril of his position, and he knows the importance of your justification. I feel that he has a right to demand it—I am assured he will receive it.

Mr. President—the scene of which we make part, and the occasion of which of which I have spoken, will soon pass away. The consequences will remain—they will remain to the State, to the criminal, and they will remain to my client. It has sometimes been my fortune to stand up as the advocate for a hopeless, friendless wretch, pursued by the avenging ministers of the law, and the fiercer vengeance of a guilty conscience. How often has my heart quailed as I looked into the terrible future which awaited him, and saw in his face that he too was gazing into the tempestuous gloom. I do not seek to read the emotion which the defendant feels as he conducts this struggle, where fraud and perjury are the weapons he is obliged to wield. My concern is with the accuser; but he, too, is on trial, and they have sought by a felon's word to strike him from the "rolls of honor." My mind will wander, as I speak the last word of his defence, to that future which your word can create. Sir, I will not indulge the thought. He is an honest man; his honor is in the hands of a high and just tribunal. The best feelings of the human heart, and the truest dictates of an unbought judgment will unite for his defence, and his blameless life and upright purpose, which have walked with him through "this firey trial will bear him unhurt amid the conflagration."

Sutter claim; the evidence taken in case 192 before the board of U.S. land commissioners, together with the brief of the United States land agent [John H. McKune]. Sacramento State journal office, 1854.
27p. O.

No. 11 in volume lettered: California land pamphlets, v.4

Missing

Listed in:	Historical records survey. Cal. A check list of California
qc015.794 H67	non-documentary imprints, 1833-1855. 1942. (Amer. imprints inventory, no. 31) p.74, no. 382

May be found in Law Section.
5-27-63 RK

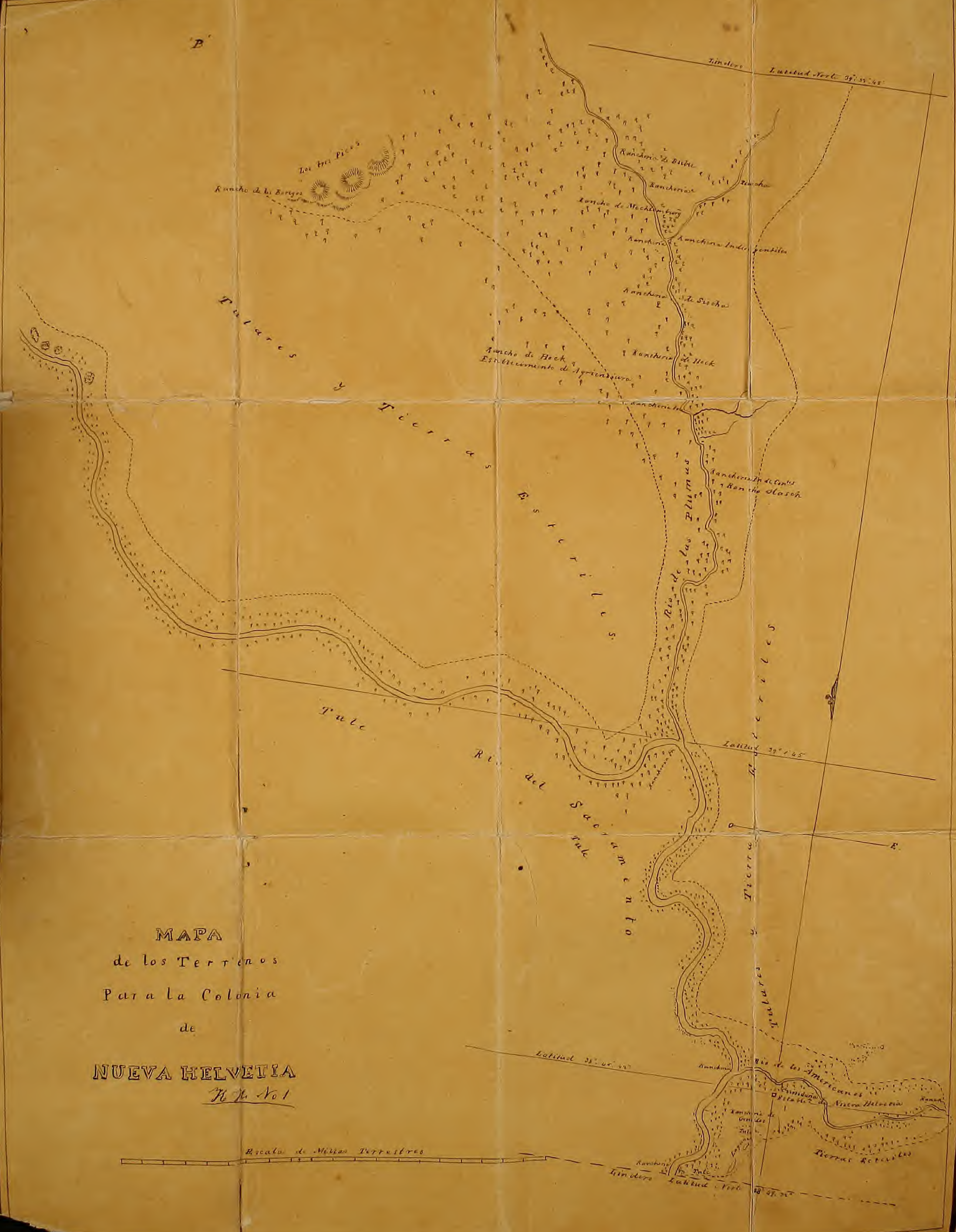
No. 92.

John A. Sutter
vs
The United States

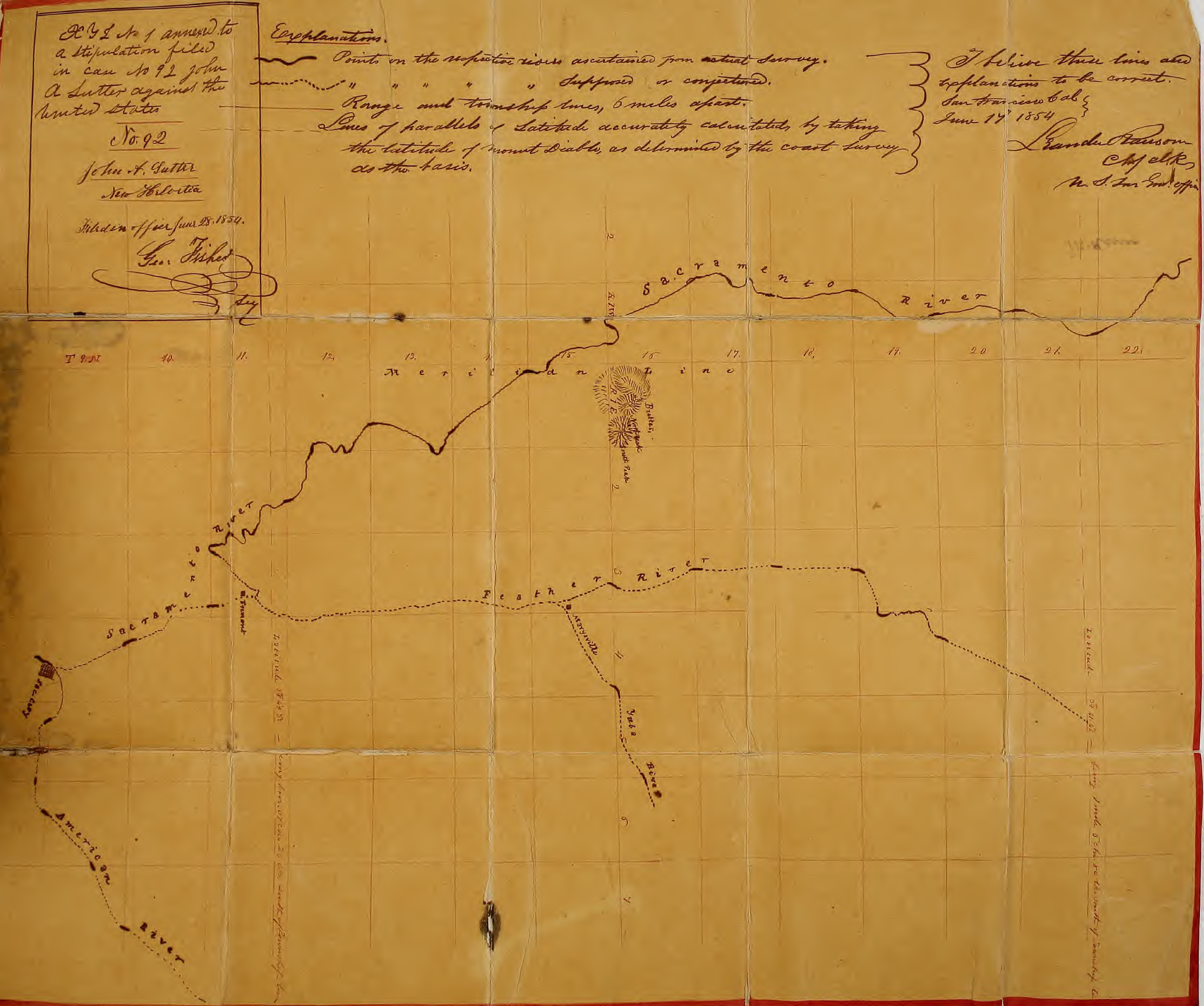
In this case on hearing the proofs and allegations, it is adjudged by the Commission that the claim of the said petitioner is valid, and it is therefore decreed that the same be confirmed. The land of which confirmation is made is situated on the American, Sacramento, and Feather Rivers, and is known by the name of New Helvetia, being the same which was granted to the said John A. Sutter by grant duly executed by Gov. Juan B. Alvarado on the 18 of June 1841 and also by a grant from Governor Manuel Micheltorena to the said John A. Sutter and his son, dated February 5th 1845. The first for eleven square leagues of land, as exhibited on the sketch annexed to the proceedings, and the second for twenty two square leagues of the "sobrante" or surplus land with his said Rancho named New Helvetia laid down on the map which accompanies the grant; the said land to be located according to the calls of the respective grants as described and explained in the depositions of John J. Vioget, filed in the case, and within the following limits, to wit; On the South by a line drawn due East from the Sacramento River so as to touch the most Southerly point of a Pond or Laguna situated near said River and about five miles South of the American River as represented on the map filed in the case and marked "B. & B. P. L." exhibit to the deposition of Juan B. Alvarado March 15 1855, which line is also marked on said map "Lindero latitud Norte 38°49' 32"" On the North by a line drawn due East from the Sacramento River to the Southern base of the mountains known as the Buttes and represented on said map by the name of Los tres Picos and from thence until it intersects the Eastern boundary of the tract as represented in said map and described in the grant and in the deposition of the said J. J. Vioget. On the West by the said River of Sacramento, and on the East by the margins of Feather River inclusive— For more particular description reference to be had to the copies of the grants filed and proved in the case and marked A. and C. to the map marked B. and to the depositions of John J. Vioget and Juan B. Alvarado, all of which are filed among the papers in the case—

(Signed) R. Aug. Thompson. }
(") S. B. Farwell. } Commissioners.

Filed in Office May 15 1855—
(Signed) Geo: Fisher.
Secy.


'B'
Los tres Picos
Rancho de los Borreyos
Rancheria de Bible
Rancheria
Rancho
Rancho de Mechlenburg
Rancheria
Rancheria Indios gentiles
Rancheria de Scocha
Rancho de Hock
Establecimiento de Agricultura
Rancheria de Hock
Rancheria
Rancheria In de Cons
Rancho Olasch
Tulares y Tierras Estériles
Rio de las Plumas
Tule
Rio del Sacramento
Tule
Tulares y Tierras Estériles
Tindero Latitud Norte 39° 37' 45"
Latitud 39° 1' 45"
O
E
Latitud 38° 45' 42"
Rancheria
Rio de los Americanos
Curtiduria
Establec.to de Nueva Helvetia
Rancheria de Gentiles
Tule
Rancho
Tierras Esteriles
Rancheria
Tule
Tindero Latitud Norte 38° 27' 32"
Escala de Millas Terrestres

MAPA
de los Terrenos
Para la Colonia
de
NUEVA HELVETIA
N. H. No 1



Exh No 1 annexed to
a stipulation filed
in case No 92 John
A Sutter against the
United States

No. 92

John A. Sutter

New Helvetia

Filed in office June 28. 1854.

Geo. Fisher

Secy

Explanations.

Points on the respective rivers ascertained from actual survey.

" " " " " supposed or conjectured.

Range and township lines, 6 miles apart.

Lines of parallels of Latitude accurately calculated, by taking the latitude of mount Diablo, as determined by the coast survey as the basis.

I believe these lines and explanations to be correct.

San Francisco Cal
June 17' 1854

Leander Ransom
Chf clk
U. S. Sur Genl office

T 9 N
10.
11.
12.
13.
14
15
16
17.
18.
19.
20
21.
22.
R 1 W
2
Sacramento River
Meridian Line
R 1 E
Buttes.
North peak
South Peak
2
Sacramento River
3
Feather River
Fremont
Marysville
4
Yuba River
5
6
7
Sac City
American River
Latitude 38°49′ [illegible] — [illegible] 20 chs. South of Township line
Latitude 39°11′45″ — [illegible] 1 mile 8 chs. [illegible] the South of Township line